(22,894)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 445.

BELLE J. BARNES, L. H. MANNING, AND EPES RANDOLPH, APPELLANTS,

vs.

J. L. B. ALEXANDER AND MARY E. STREET, EXECUTRIX OF WEBSTER STREET, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

	Original.	Print
Caption	a	1
Transcripts from district court in and for the county of Cochise	1	1
Complaint	1	1
Demurrer and answer	6	4
Affidavit supporting application to intervene	7	4
Complaint of intervenors	9	5
Order of intervention	14	8
Amended complaint in intervention	15	8
Answer of plaintiff to complaint in intervention	22	12
Amended answer of defendants to amended complaint in intervention	25	14
Answer to intervention of defendants	30	16
Motion to strike from files amended answer of defendants	34	18
Judgment	35	18
Motion for new trial	36	19
Agreement between Costello *et ux.* and Shattuck *et al.*, January 22, 1904	37	19
Certificate to judgment roll	42	22

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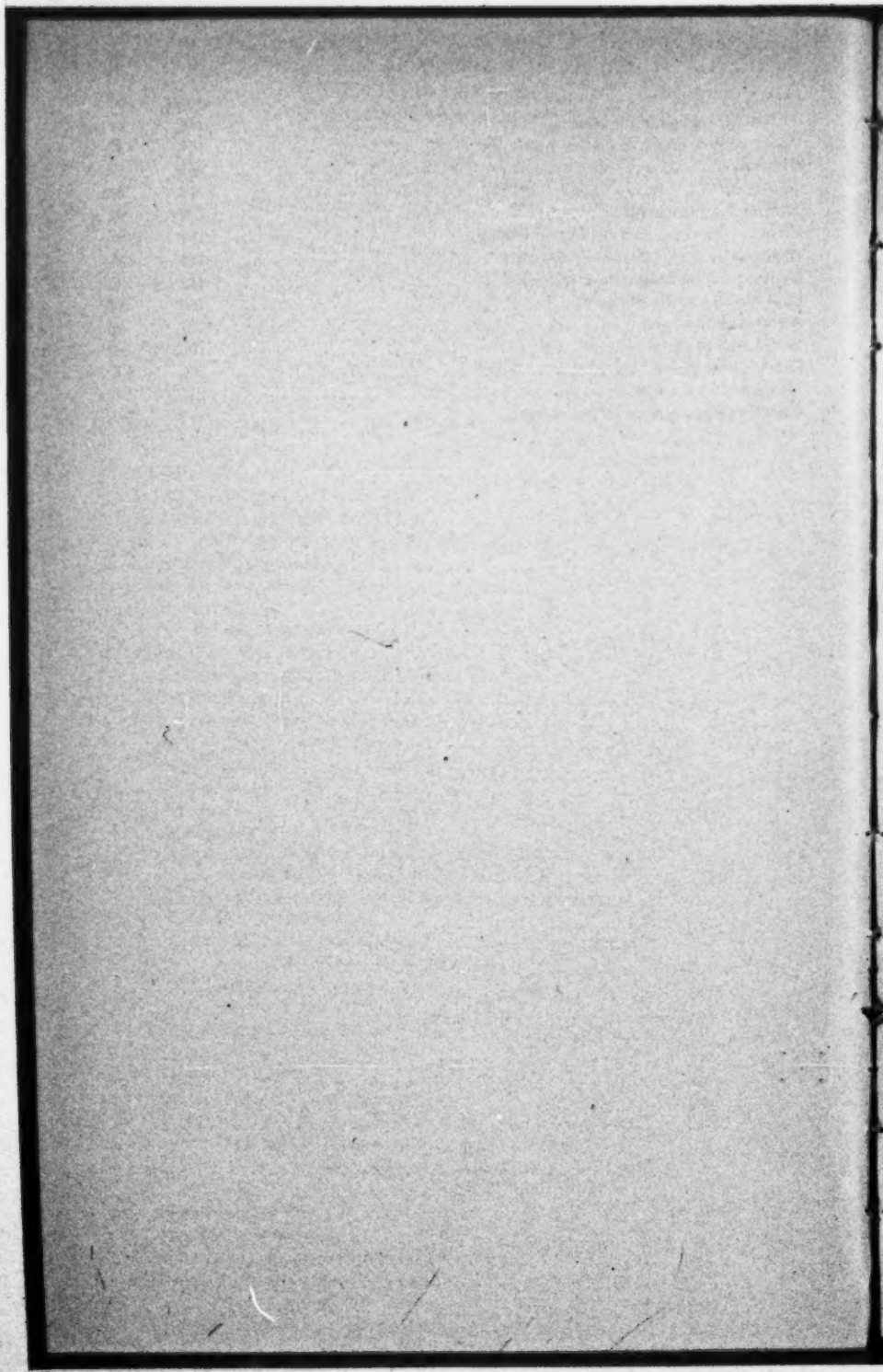
	Original.	Print
Exhibit 1—Letter, Street & Alexander to O'Connell, October 9, 1907	44	23
2—Telegram, Barnes to Martin, January 6, 1903	47	25
3—Telegram, Martin to Barnes, January 7, 1903	47	25
4—Letter, Barnes to Dr. John, January 7, 1903	47	25
A—Letter, Barnes to Street, January 26, 1903	48	25
B—Will of Wm. Henry Barnes	50	26
C—Decree of distribution in Barnes estate	51	27
D—Letter, Martin to Hereford & Hazzard, March 9, 1905	56	30
D—Letter, Doan to Street, June 20, 1903	57	30
Clerk's certificate as to transcript	58	30
Order granting motion in intervention	59	31
Order for trial by jury	60	32
Order setting cause	61	32
Order passing cause	61	33
Order granting trial by jury	62	33
Order passing cause	63	34
Order setting cause for trial	63	34
Order overruling demurrer to amended complaint	64	34
Order beginning trial, &c	65	35
Order for continuance	66	36
Judgment	67	36
Order denying new trial	68	37
Appeal and order for stay	68	37
Order granting time to file transcript of evidence	69	37
Supersedeas bond	70	38
Clerk's certificate to minute entries	73	39
Reporter's transcript of evidence	74	40
Appearances, &c	74	40
Statement of facts	75	40
Testimony of J. M. O'Connell	79	42
Testimony of C. A. McDonald	109	57
Agreement, Costello *et ux.* and Shattuck *et al.*, Jan. 22, 1904	110	58
Testimony of J. L. B. Alexander	116	61
Exhibit 1—Letter, Street & Alexander to O'Connell, October 9, 1907	127	66
A—Letter, Barnes to Street, January 26, 1903	132	69
B—Will of Wm. Henry Barnes	139	72
C—Decree of distribution	141	73
Testimony of J. M. O'Connell (recalled)	145	75
Exhibit D—Letter of Doan to Street, June 20, 1903	147	76
Plaintiff rests	147	76
Motion to dismiss	147	76
Testimony of John H. Martin	148	77
Exhibit 2—Telegram, Barnes to Martin, January 6, 1903	152	79
4—Letter, Barnes to Dr. John, January 7, 1903	154	80
E—Letter, Martin to Hereford & Hazzard, March 9, 1905	159	82
Evidence closed	165	86
Reporter's certificate	165	86
Judge's certificate to reporter's transcript	166	86
Order granting appellees time to file brief	167	86

	Original	Print
Order setting cause for hearing	167	87
Order submitting cause after argument	168	87
Opinion	169	87
Judgment	178	92
Motion for rehearing	179	92
Order submitting motion for rehearing	181	93
Order denying motion for rehearing	181	93
Petition for and allowance of appeal	182	93
Supersedeas and cost bond	183	94
Assignments of error	187	96
Statement of facts	193	99
Clerk's certificate	209	107
Citation and service	210	107
Order enlarging time to file record	212	108



a In the Supreme Court of the Territory of Arizona.

No. 1169.

BELLE J. BARNES, Appellant,
vs.
L. C. SHATTUCK et al., Defendants; MARY E. STREET, Executrix, and J. L. B. ALEXANDER, Intervenors, Appellees.

Eugene S. Ives, Esq., attorney for Appellant.
J. L. B. Alexander, Esq., and George D. Christy, Esq., (of the law firm of Alexander and Christy), and Wm. M. Seabury, Esq., attorneys for Intervenors and Appellees.

On Appeal from the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

Be it remembered that on to-wit: the seventeenth day of September, 1910, came the appellant in the above entitled cause, by her attorneys, and filed in the clerk's office of said Supreme Court, in said entitled cause, a certain Judgment Roll in words and figures following, to-wit:

1 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BELLE J. BARNES, Plaintiff,
vs.
L. C. SHATTUCK, H. R. HANNINGER and EMIL MARKS, Defendants.

Complaint.

Now comes the plaintiff and complains of the defendants, and alleges and avers:

I.

That the plaintiff is a resident of the County of Pima, Territory of Arizona, and the defendants are residents of the County of Cochise, in the said Territory.

II.

That the plaintiff is the widow of one William H. Barnes who died testate at the County of Pima, Territory of Arizona, on the 10th day of November, 1904. That prior to his death said W. H. Barnes and one John H. Martin were attorneys at law duly admitted
2 to practice as such in all the courts of said Territory, and were co-partners doing business under the firm name and style of "Barnes & Martin" at the City of Tucson, in the County of Pima, Territory of Arizona.

III.

That sometime prior to the said 10th day of November, 1901, the said defendants employed the said William H. Barnes and John H. Martin, co-partners as aforesaid, to act as the attorneys for the said defendants in and about certain litigation then pending or about to be commenced in this court between the said above named defendants and one Martin Costello and certain other parties involving the title and right to possession of certain mining property, to-wit, the "Roy" and "Leo" mining claims, situate in the Warren Mining District in Cochise County, Arizona, and that said William H. Barnes and John H. Martin accepted such employment, and thereafter acted as attorneys for the above named defendants in and about the litigation as hereinafter stated.

IV.

That at the time of such employment it was agreed between the said William H. Barnes and John H. Martin, co-partners as aforesaid, and the defendants herein, that as compensation for their services as such attorneys in and about such litigation the said
3 firm of Barnes and Martin should receive, and said defendants should pay one-fourth of all money or property received by the said defendants as the result of such litigation or by way of settlement or compromise thereof.

V.

That in pursuance of such employment and the agreement for compensation aforesaid, the said William H. Barnes and John H. Martin, co-partners as aforesaid, did act as the attorneys for said defendants and did perform legal services as such in and about the said litigation, and did do and perform all service required of them as such attorneys in and about the litigation aforesaid and other matters connected therewith.

VI.

That while said litigation was pending and long after the commencement thereof, and on or about the 22d day of January, 1904, the defendants herein made and entered into a contract with said Martin Costello and Mary Costello, his wife, by the terms of which the matters at issue between the said parties and involved in the said litigation were fully settled and adjusted and certain sums were to be paid and received by the defendants herein in settlement and adjustment of their claims to the mining property aforesaid.

4 VII.

Plaintiff further alleges on information and belief that said contract of settlement and adjustment was thereafter carried out and that large sums of money were paid to and received by the said defendants as the proceeds of said settlement and adjustment and of their interest in said property, the exact amount

of such money being to the plaintiff unknown; and plaintiff is further informed and believes and therefore alleges, that in lieu of certain moneys provided in said contract to be paid to said defendants, there was issued and delivered to said defendants and received by them certain shares of the capital stock of the Shattuck-Arizona Copper Mining Company, a corporation duly organized under the laws of the Territory of Arizona, and doing business in said Cochise County, which said shares of stock, as plaintiff is informed and believes are now held and owned by the said defendants.

VIII.

That by reason of the contract of employment aforesaid, the said William H. Barnes and John H. Martin, co-partners as aforesaid, became and were entitled to one-fourth of all of said moneys and stock so received by the said defendants as the proceeds of such settlement and adjustment and of their interest in the said property and that no part thereof was paid or delivered by the defendants or any of them to the said William H. Barnes and John H. Martin, co-partners as aforesaid or to either of them.

IX.

Plaintiff further alleges that the last will and testament of said William H. Barnes was after his death as aforesaid duly admitted to probate by the probate court of Pima County, Arizona, which court then and there had jurisdiction of the property under said will, and such proceedings were thereafter had in said probate court in said matter that on the 10th day of April, 1906, all the property and estate of said W. H. Barnes after payment of his debts was assigned, transferred and distributed to this plaintiff; and that thereafter the said John H. Martin individually and as surviving attorney of the said firm of Barnes & Martin, assigned and transferred the said claim and demand of said firm of Barnes & Martin against the defendants for the compensation aforesaid, and all rights of action against the defendants on account of such compensation to this plaintiff, and that plaintiff is now the owner of all such claims and demands on account of the service so performed by said firm of Barnes & Martin as aforesaid.

X.

Plaintiff further alleges on information and belief that the said money and stock was so received by the defendants during the month of April, 1906. That plaintiff has demanded of the defendants a full, true and correct accounting of all moneys and stock so received by them, but the defendants have refused to render such account and have never accounted to this plaintiff for the moneys and stock so received and have never paid to the plaintiff any money whatever on account of the said claim, or delivered any of said stock to the plaintiff.

Wherefore plaintiff prays judgment as follows:

1. That the defendants be required to fully account to the plaintiff for the amounts received by them or either of them in settlement and adjustment of the litigation aforesaid, and that it be decreed that the plaintiff recover of the defendants and each of them one-fourth of all moneys received by them, and that defendants be required to transfer and assign to the plaintiff one-fourth of all stock in said corporation so received by them, or, in the event of their failure or refusal to so transfer or assign the same, the plaintiff have judgment against them and each of them for the value of one-fourth of all stock so received by them.

2. For such further relief as the Court may deem just and equitable.

3. For the costs of this action.

EUGENE S. IVES,
Attorney for Plaintiff.

(Filed Oct. 23, 1907.)

Demurrer and Answer.

(Title of Cause.)

Now come the defendants, Shattuck, Hanninger and
7 Marks, and answering plaintiff's complaint, for demurrer allege:

That said complaint does not state facts sufficient to constitute a cause of action.

And for further answer these defendants deny each and every allegation in plaintiff's complaint contained.

Wherefore, defendants pray that plaintiff take nothing by her action, and that defendants recover their costs in this behalf incurred and expended.

O'CONNELL & McREYNOLDS,
BEN GOODRICH,
Attorneys for Defendants.

Filed November 9, 1907.

(Title of Court and Cause.)

Affidavit Supporting Application to Intervene.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

Webster Street being duly sworn, deposes and says, that he and one J. L. B. Alexander, through all the times hereinafter mentioned, were partners at law, practicing the same in Phœnix, Maricopa County, Arizona, and while they were such partners rendered legal services for the law firm of Barnes and Martin and one J. M. O'Connell, who is also a lawyer and practicing in Cochise County, Arizona; that said firm of Street and Alexander have an interest in the sub-

ject matter of this action, both as against the plaintiff and
8 defendants therein, and claim an interest therein; they also allege that one J. M. O'Connell is a necessary and proper party to the foregoing action, and that he, the said J. M. O'Connell, has received some monies which were due himself and the said Barnes and Martin from the said defendants and has failed to pay over to the said Barnes and Martin, or to the said Street and Alexander, any portion of the money so received for them and all of them, and that the said defendants have failed to pay over to the said O'Connell and the said Barnes and Martin, the amount of money due from them to said O'Connell and said Barnes and Martin, wherewith to pay the share and portion of said Street and Alexander the whole amount of money agreed by said defendants to be paid by the defendants, the said O'Connell and the said Barnes and Martin.

Wherefore affiant says that the firm of Street and Alexander have an interest in the subject matter of this litigation and ask to become intervenors thereof and also says that the said J. M. O'Connell is a necessary party and he also asks that said J. M. O'Connell be made a party defendant to this action; and that he answer the complaint of intervenors.

And this affiant will ever pray, etc.

WEBSTER STREET.

Subscribed and sworn to before me this 26th day of December, 1907.

[SEAL.] P. H. HAYES,
Notary Public.

My commission expires Oct. 18, 1911.

Filed December 28, 1907.

9 (Title of Court and Cause.)

Complaint of Intervenors.

And now comes the Intervenors, Webster Street and J. L. B. Alexander, and by leave of the Court had and obtained, files this their Complaint in Intervention and for cause of action say:

I.

That they and each and both are residents of Maricopa County, Arizona, and that at all times hereinafter mentioned they were attorneys at law and legally engaged in the practice of law in various courts in the Territory of Arizona, and in the Supreme Court of the United States, and at all times hereinafter mentioned were partners in the practice of the law, under the firm name of Street and Alexander, and having and maintaining an office in practice of the law in the City of Phœnix, and practicing in the various courts of Arizona, and the Supreme Court of the United States.

II

That the Intervenors admit the facts alleged in paragraphs I and II of the complaint of Belle J. Barnes, Plaintiff.

III.

Intervenors further allege that the firm of Barnes and Martin and J. M. O'Connell, practicing lawyers in the various courts of the Territory of Arizona, were employed to act as the attorneys for the said defendants in and about certain litigation then pending, or about to be commenced, in this Court between the said above named defendants and one Martin Costello and certain other parties involving the title and right of possession of certain mining property, to wit: the "Roy" and "Leo" mining claims situate in the Warren Mining District in Cochise County, Arizona, and that the said Barnes and Martin and the said J. M. O'Connell accepted such employment, and thereafter acted as attorneys for the above named defendants in and about the litigation hereinafter stated.

IV.

That at the time of such employment it was agreed between the parties thereto, that as compensation for their services as such attorneys in and about such litigation, the said firm of Barnes and Martin and the said J. M. O'Connell should receive as pay for said services, and said defendants should pay one-fourth of all money or property received by said defendants as the result of such litigation, or by way of settlement or compromise thereof.

V.

That in pursuance of such employment and the agreement of compensation aforesaid, the said firm of Barnes and Martin and the said J. M. O'Connell, did act as the attorneys for said defendants and did perform legal services as such in and about the said litigation, and do and perform services required of them and other matters connected therewith.

VI.

That while said litigation was pending and long after the commencement thereof, and on or about the 22nd day of January, 1904, the defendants herein made and entered into a contract with said Martin Costello and Mary Costello, his wife, by the terms of which the matters at issue between the said parties and involved in the said litigation were fully settled and adjusted and certain sums were paid and received by defendants herein in settlement and adjustment of their claims to the mining property aforesaid.

VII.

Intervenors further allege on information and belief that said contract of settlement and adjustment thereafter was carried out and

that large sums of money were paid to and received by the said defendants as the proceeds of said settlement and adjustment and of their interest in said property, the exact amount of such money being to the intervenors unknown; and the intervenors are further informed and believe and therefore allege, that in lieu of certain moneys provided in said contract to be paid to said defendants, there was issued and delivered to said defendants and received by them certain shares of the capital stock of the Shattuck-Arizona Copper Mining Company, a corporation duly organized under the laws of the Territory of Arizona, and doing business in said Cochise County, which said shares of stock, as plaintiff is informed and be-
12 lieves are now held and owned by the said defendants.

VIII.

That said Webster Street and J. L. B. Alexander, as Intervenors of said action, allege and say, that while the said Barnes and Martin and the said J. M. O'Connell were acting as attorneys for the defendant, as plaintiff alleges, and were to receive compensation as plaintiff alleges, the said Barnes and Martin and the said J. M. O'Connell employed Messrs. Street and Alexander, intervenors, herein, to help them in the prosecution and defense of the issues undertaken by them in the litigation of the case with defendants, and promised then that they, the said Street and Alexander, should share with them their said fee and promised them one-third thereof; that is to say, the firm of Barnes and Martin should receive one-third of said fee, one J. M. O'Connell should receive one-third of said fee, and the firm of Street and Alexander should receive one-third of said fee, which said proffer was accepted by the said Street and Alexander and the said Street and Alexander did so lend their services and help in the prosecution and defense of said case for the price of one-third which they, the said Barnes and Martin and the said J. M. O'Connell, should receive and have paid to them as a fee in such matter.

IX.

That by reason of the contract of employment aforesaid with the defendants, the said Barnes and Martin and the said J. M.
13 O'Connell, became and were entitled to one-fourth of said monies and stock so received by the said defendants as the proceeds of such settlement and adjustment and of their interest in said property, paying and delivering to said Street and Alexander their portion, being the one-third of said one-fourth.

X.

Intervenors further admit the allegation contained in paragraph IX of the complaint of Belle J. Barnes, and further allege on information and belief that a large amount of money and stock was so received by the defendant J. M. O'Connell, during the month of April, 1906, and that he has paid no part thereof to said Barnes and Martin or to said Street and Alexander, and *and* that he now holds

the same and every part thereof, and now has and retains all of said proceeds and retains all said money.

And that said Street and Alexander are now entitled to one-third of the money or property which has been turned over to said J. M. O'Connell or the said Barnes and Martin, or which is to be turned over to them or any of them as their one-fourth fee from the defendants in this action.

That said intervenors have an interest in the matter in litigation and also said J. M. O'Connell is a necessary party and has an interest in said litigation and these intervenors ask that the said J. M. O'Connell be made a party defendant and that these intervenors not only intervene as to the matter in litigation between the parties plaintiff and defendant, but that they become intervenors be-
14 twe-n all the parties to the action, including the said J. M. O'Connell, and that they have an accounting between all the parties to this action including the said J. M. O'Connell and that they be decreed one third of all monies, properties, stocks or whatever was paid, or by right ought to be paid to the said Barnes and Martin and the said J. M. O'Connell.

For such other relief as the Court may deem just and equitable. And for the Costs of this action.

WEBSTER STREET,
J. L. B. ALEXANDER,
Attorney in Propria Persona.

Filed December 28, 1907.

(Title of Court and Cause.)

Order of Intervention.

The foregoing complaint in intervention, having this day been presented to me in open court, and leave having been asked to file the same by Webster Street and J. L. B. Alexander, as the law firm of Street and Alexander, intervenors named therein, and it appearing that good cause exist therefor, it is ordered that leave be hereby granted to file the same and Messrs. Street and Alexander be permitted to become intervenors in said cause.

15 Done in open Court.

FLETCHER M. DOAN, *Judge.*

Filed December 28, 1907.

Amended Complaint in Intervention.

(Title of Cause.)

And now comes the intervenors, Mary E. Street, executrix, and J. L. B. Alexander, and by leave of Court, having been previously had and obtained, files this their first Amended Complaint in intervention and for cause of action say:

I.

That they and each and both of them are residents of Maricopa County, Arizona.

II.

That at all times hereinafter mentioned, Webster Street
16 and J. L. B. Alexander, intervenor herein, were attorneys at law, and legally engaged in the practice of the law in various courts in the Territory of Arizona, and in the Supreme Court of the United States, and at all times hereinafter mentioned were partners in the practice of the law, under the firm name of Street & Alexander, and having and maintaining an office in the practice of the law in the City of Phœnix and practicing in the various courts of Arizona and the Supreme Court of the United States.

III.

That the intervenors admit the facts alleged in paragraphs I and II of the complaint of Belle J. Barnes, Plaintiff.

IV.

Intervenors further allege that the firm of Barnes & Martin and J. M. O'Connell, practicing lawyers in the various courts of the Territory of Arizona, were employed to act as the attorneys for the said defendants in and about certain litigation then pending, or about to be commenced, in this Court between the said above named defendants and one Martin Costello and certain other parties involving the title and right of possession of certain mining property, to-wit: the "Roy" and "Leo" mining claims situate in the Warren Mining District in Cochise County, Arizona, and that the
said Barnes & Martin and the said J. M. O'Connell accepted
17 such employment, and thereafter acted as attorneys for the above named defendants in and about the litigation hereinafter stated.

V.

That at the time of such employment it was agreed between the parties thereto, that as compensation for their services as such attorneys in and about such litigation, the said firm of Barnes & Martin and the said J. M. O'Connell should receive as pay for said services, and said defendants should pay one-fourth of all money or property received by said defendants as the result of such litigation, or by way of settlement or compromise thereof.

VI.

That in pursuance of such employment and the agreement of compensation aforesaid, the said firm of Barnes & Martin and the said J. M. O'Connell, did act as the attorneys for said defendants and did perform legal services as such in and about the said litigation, and do and perform services required of them and other matters connected therewith.

VII.

That while said litigation was pending and long after the commencement thereof, and on or about the 22nd day of January, 1904, the defendants herein made and entered into a contract with said Martin Costello and Mary Costello, his wife, by the
18 terms of which the matters at issue between the said parties and involved in the said litigation were fully settled and adjusted and certain sums were paid and received by defendants herein in settlement and adjustment of their claims to the mining property aforesaid.

VIII.

Intervenors further allege on information and belief that said contract of settlement and adjustment thereafter was carried out and that large sums of money were paid to and received by the said defendants as the proceeds of said settlement and adjustment and of their interest in said property, the exact amount of such money being to the intervenors unknown; and the intervenors are further informed and believe and therefore allege, that in lieu of certain moneys provided in said contract to be paid to said defendants, there was issued and delivered to said defendants and received by them certain shares of the capital stock of the Shattuck-Arizona Copper Mining Company, a corporation duly organized under the laws of the Territory of Arizona, and doing business in said Cochise County, which said shares of stock, as plaintiff is informed and believes are now held and owned by the said defendants.

IX.

That said Mary E. Street, executrix, and J. L. B. Alexander as intervenors in said action, allege and say, that while the said
19 Barnes and Martin and the said J. M. O'Connell were acting as attorneys for the defendant, as plaintiff alleges, and were to receive compensation as plaintiff alleges, the said Barnes & Martin and the said J. M. O'Connell employed Messrs. Street and Alexander, then co-partners as aforesaid, to help them in the prosecution and defense of the issues undertaken by them in the litigation of the case with defendants, and promised them that they, the said Street and Alexander, should share with them their said fee and promised them one-third (1/3) thereof. That is to say, the firm of Barnes & Martin should receive one-third (1/3) of said fee, the said J. M. O'Connell should receive one-third (1/3) of said fee and the firm of Street & Alexander should receive one-third (1/3) of said fee, which said proffer was accepted by the said Street and Alexander and the said Street and Alexander did so lend their services and help in the prosecution and defense of said case for the price of one-third (1/3) which they, the said Barnes and Martin and the said J. M. O'Connell should receive and have paid to them as a fee in such matter.

X.

That by reason of the contract of employment aforesaid, with the defendants, the said Barnes and Martin and the said J. M. O'Connell, became and were entitled to one-fourth of said moneys and stocks so received by the said defendants as the pro-
20 ceeds of such settlement and adjustment and of their interest in the said property paying and delivering to said Street and Alexander their portion, being the one-third of said one-fourth.

XI.

Intervenors further admit the allegation contained in paragraph IX of the complaint of Belle J. Barnes, and further allege on information and belief that a large amount of money and stock was so received by the defendant, J. M. O'Connell, during the month of April, 1906, and that he has paid no part thereof to said Barnes and Martin or to the said Street and Alexander, and that he now holds the same and every part thereof, and now has and retains all of said proceeds and retains all said money. And that said Mary E. Street, executrix, and J. L. B. Alexander are now entitled to one-third of the money or property which has been turned over to said J. M. O'Connell or the said Barnes and Martin, or which is to be turned over to them or any of them as their fee from the defendants in this action.

XII.

That said Webster Street in his lifetime made and published his last will, whereby he appointed Mary E. Street, one of the intervenors herein, executrix; that on or about the 22nd day of September, 1908, at the City of Los Angeles, Cal., the said Webster Street died.

21 That on the 30th day of October, 1908, letters testamentary were duly issued on the said will to the said Mary E. Street; that thereupon the said Mary E. Street duly qualified as such executrix and entered upon the discharge of the duties of her said office and that said letters have not been revoked.

That said intervenors have an interest in the matter in litigation and also said J. M. O'Connell is a necessary party and has an interest in said litigation and these intervenors ask that the said J. M. O'Connell be made a party defendant and that these intervenors not only intervene as to the matter in litigation between the parties plaintiff and defendant, but that they become intervenors between all the parties to the action, including the said J. M. O'Connell, and that they have an accounting between all the parties to this action, including the said J. M. O'Connell, and that they be decreed one-third of all moneys, properties, stocks or whatever was paid, or by right ought to be paid to the said Barnes and Martin and the said J. M. O'Connell.

For such other relief as the Court may deem just and equitable. And for the costs of this action.

J. L. B. ALEXANDER,
In Propria Persona.
P. H. HAYES,
For Mary E. Street, Executrix of Webster Street, Deceased, and for J. L. B. Alexander.

(Filed April 26, 1909.)

22 *Answer of Plaintiff to Complaint in Intervention.*

(Title of Cause.)

Now comes the plaintiff and for answer to the complaint in intervention, demurs to the same, on the ground that the facts stated therein do not constitute a ground of intervention, and do not constitute a cause of action by the plaintiffs in intervention against the defendants or either of them, and do not constitute any right on the part of the plaintiffs in intervention to any relief whatever in this action.

EUGENE S. IVES,
Attorney for Plaintiff.

If said demurrer should be overruled, then further answering, the plaintiff alleges and avers:

I.

The plaintiff has no knowledge or information sufficient to form a belief, and therefore denies that the plaintiffs in intervention were at all or any of the times in the complaint in intervention mentioned, partners in the practice of the law, having or maintaining an office for the practice of the law in the City of Phœnix or elsewhere.

II.

Upon information and belief plaintiff denies that J. M. O'Connell in paragraph III of said complaint in intervention men-
23 tioned, was employed to act as attorney for the defendants in and about that certain litigation in said paragraph III mentioned and set forth, or that the said O'Connell accepted said employment; and alleges that the said Barnes & Martin were employed by the defendants in and about said litigation.

Upon information and belief plaintiff denies that at the time of the employment of said Barnes & Martin by the defendants, it was agreed that the said firm of Barnes & Martin and the said J. M. O'Connell should receive as pay for services one-fourth of all money or property received by said defendants as the result of such litigation, or by way of settlement or compromise thereof; and alleges upon information and belief that at said time it was agreed that the said firm of Barnes & Martin should receive for said serv-

ices and defendants should pay therefor, one-fourth of all money or property received by said defendants as the result of such litigation or by way of settlement or compromise thereof.

III.

The plaintiff denies that the said O'Connell rendered services in pursuance of the alleged employment and agreement of the complaint in intervention set forth.

IV.

Upon information and belief, the plaintiff denies that the
24 said Barnes & Martin and the said J. M. O'Connell at any time employed the plaintiffs in intervention as Messrs. Street & Alexander or otherwise, or at all, to help them in the prosecution or defense of the issues in the said litigation, or promised them that they, the said Street & Alexander, or either of them, should share with them or either of them their said fee, or promised them one-third thereof or any proportion thereof at all; or that the alleged proffer in paragraph VIII of the complaint in intervention set forth was accepted by the said Street & Alexander, or either of them, or that the said Street & Alexander, or either of them, did lend their services as alleged in the complaint in intervention, or at all, or helped in the prosecution or defense of such case for the price of one-third which they, the said Barnes & Martin and the said O'Connell, should receive and have paid to them as a fee in such matter, or for any price; and the plaintiff denies upon information and belief that the said Barnes & Martin and O'Connell, or any or either of them, were, by reason of the facts of the complaint in intervention alleged, or at all, to pay or deliver to said Street & Alexander their, or any portion, being one-third of one-fourth, or any proportion whatever.

V.

Plaintiff denies that said Street & Alexander, or either of them, are entitled to one-third or any portion of the money or property alleged to have been turned over to the said O'Connell or to
25 the said Barnes & Martin or which is to be turned over to them or any or either of them as their one-fourth of the fee from the defendants or at all; and plaintiff denies that the said intervenors, or either of them, has any interest in the matter in litigation in this action.

Wherefore, plaintiff asks that the plaintiffs in intervention receive nothing herein, and for her costs against said plaintiffs in intervention.

EUGENE S. IVES,
Attorney for Plaintiff.

Duly verified by Eugene S. Ives, Attorney for Plaintiff.
(Filed July 16, 1908.)

Amended Answer of Defendants to Amended Complaint in Intervention.

(Title of Cause.)

Come now the abovenamed defendants, L. C. Shattuck, H. R. Hanninger and Emil Marks, and demur to the amended complaint in intervention, on the ground that the said amended complaint does not state facts sufficient to permit the plaintiffs to intervene, and upon the further ground that the said amended complaint in intervention does not state facts sufficient to constitute a cause of action against the said abovenamed defendants or any or either of them.

J. M. O'CONNELL,
BEN GOODRICH,
Attorneys for Defendants.

And if said demurrer should be overruled, then the said
26 defendants further answering said amended complaint in intervention, allege and aver

They admit all the allegations contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 in said petition in intervention.

And further answering, these defendants admit that a contract of settlement or adjustment was made and carried out between Martin Costello and these defendants, Shattuck, Hanninger and Marks, by the terms of which the said Costello granted to said defendants the right to purchase the Roy and Leo mining claims, situate in Warren Mining District, Cochise County, Arizona, part of which was the ground in controversy in the said litigation, and that thereafter the said defendants granted to M. Pattison, Thos. Barden, A. M. Chisholm and A. Guthrie, an option to purchase the said Roy and Leo mines for Seventy-five Thousand Dollars ($75,000) additional to the amount mentioned in the option given by Costello to them. That thereafter the said option was exercised by the said Pattison, et al., and the defendants Shattuck, Marks and Hanninger received the sum of Seventy-five Thousand Dollars ($75,000) as full consideration for the assignment of all of their rights under said option, and in and to the ground in controversy. That thereafter the said defendants Shattuck, Marks and Hanninger paid to defendant J. M. O'Connell the sum of Eighteen Thousand Seven Hundred and Fifty Dollars ($18,750) in full payment of the agreement for attorney fees,
27 as alleged in the said petition in intervention, and that thereafter the said J. M. O'Connell paid to the said Barnes & Martin, Belle J. Barnes, executrix of Wm. H. Barnes, deceased, and also assignee of Barnes & Martin, the sum of Twelve Thousand Five Hundred Dollars ($12,500) as full payment and satisfaction of the interest of Barnes & Martin in said contract.

But these defendants deny that there was issued or delivered to said defendants or either one of them, or received by them, any shares of the capital stock of the Shattuck-Arizona Mining Company, mentioned and described in intervenors' petition in intervention, in lieu of any moneys paid to or received by them on said contract.

These defendants further deny that Barnes & Martin and J. M. O'Connell employed the firm of Street & Alexander to help them in the prosecution and defense of the issues undertaken by them in the litigation of said case with defendants, or ever promised intervenors that they (the said Street & Alexander) should share with them in said fee or promised them one-third or any part thereof. These defendants allege that so far as they know, it may be true that the firm of Barnes & Martin employed Messrs. Street & Alexander, but deny that J. M. O'Connell ever had anything to do with said employment or ever employed said parties in any shape or manner, or that defendants Shattuck, Marks or Hanninger ever employed or had notice or knowledge of said Street & Alexander having been employed by said Barnes & Martin, if they were em-
28 ployed, and deny that they or either of them, or the said J. M. O'Connell, ever promised to the said firm of Street & Alexander any fee whatever, either in money or otherwise.

These defendants admit that Barnes & Martin and J. M. O'Connell became and were entitled to one-fourth of said moneys received by said defendants as the proceeds of said settlement and adjustment of their interest in said property, but deny that they were ever entitled to any stock whatever of any kind or of any corporation.

These defendants further deny that during the month of April, 1906, or at any other time, J. M. O'Connell ever received any moneys, other than hereinbefore specified, and deny that he ever did receive any stock at all on account of said contract of employment as attorney for said defendants, and deny that said O'Connell now holds the same or any part thereof, or has or retains all or any of said proceeds or all of said moneys or any of it, and deny that Mary E. Street, as executrix or otherwise, or J. L. B. Alexander is entitled to one-third or any other portion of the money or property turned over to said J. M. O'Connell or to the said Barnes & Martin.

These defendants further deny, on information and belief, that intervenors have any interest in the matter in litigation, and deny that J. M. O'Connell is a necessary or proper party or has any interest in said litigation, and deny that they are entitled to any
29 accounting as against these defendants or either of them.

Wherefore, these defendants pray that they be dismissed hence without day, and recover of the intervenors their costs in this action incurred and expended, and that intervenors recover nothing.

BEN GOODRICH,
J. M. O'CONNELL,
Attorneys for said Defendants.

TERRITORY OF ARIZONA,
County of Cochise, ss:

J. M. O'Connell being first duly sworn deposes and says that he is one of the attorneys for defendants, that he has read the foregoing answer and knows the contents thereof, that he is better informed as to the matter therein stated than defendants and verifies

this answer in their behalf; That the allegations and denials contained in the foregoing answer *is* true in substance *is* in fact.

[SEAL.] J. M. O'CONNELL.

Subscribed and Sworn to before me this 7th day of January, 1910.

GEORGE B. WILCOX, *Clerk.*

30 (Title of Court and Cause.)

Now come the defendants, L. C. Shattuck, H. R. Hanniger, Emil Marks and J. M. O'Connell, and answering the petition in intervention filed by Mary Street, executrix, and J. L. B. Alexander, admit all the allegations contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 in said petition in intervention.

And further answering, these defendants admit that a contract of settlement or adjustment was made and carried out between Martin Costello and these defendants, Shattuck, Hanniger and Marks, by the terms of which the said Costello granted to said defendants the right to purchase the Roy and Leo mining claims, situated in Warren Mining District, Cochise County, Arizona, part of which was the ground in controversy in the said litigation, and that thereafter the said defendants granted to M. Pattison, Thos. Barden, A. M. Chisolm and A. Guthrie, an option to purchase the said Roy and Leo mines for Seventy-five Thousand ($75,000) Dollars additional to the amount mentioned in the option given by Costello to them. That thereafter the said option was execised by the said Pattison, et al., and the defendants Shattuck, Marks and Hanniger received the sum of Seventy-five Thousand ($75,000) Dollars as full consideration for the asignment of all their rights under said option, and in and to the ground in controversy. That thereafter the said defendants, Shattuck, Marks and Hanniger paid to defendant J. M. O'Connell the sum of Eighteen Thousand Seven Hundred and fifty ($18.750) Dollars in full payment
31 of the agreement for attorney fees, as alleged in the said petition in intervention, and that thereafter the said J. M. O'Connell paid to the said Barnes & Martin, Belle J. Barnes, executrix of Wm. H. Barnes, deceased, and also assignee of Barnes & Martin, the sum of Twelve Thousand Five Hundred ($12,500) Dollars as full payment and satisfaction of the interest of Barnes & Martin in said contract.

But these defendants deny that there was issued or delivered to said defendants or either of them, or received by them, any shares of the capital stock of the Shattuck-Arizona Copper Mining Company, mentioned and described in intervenors' petition in intervention in lieu of any monies paid to or received by them on said contract.

These defendants further deny that Barnes & Martin and J. M. O'Connell employed the firm of Street and Alexander to help them in the prosecution and defense of the issues undertaken by them in the litigation of said case with defendants, or ever promised intervenors that they (the said Street & Alexander) should share with

them in said fee or promised them one-third or any part thereof. These defendants allege so far as they know, it may be true that the firm of Barnes & Martin employed Messrs. Street & Alexander, but deny that J. M. O'Connell ever had anything to do with said employment or ever employed said parties in any shape or manner, or that defendants Shattuck, Marks or Hanniger ever employed or had notice or knowledge of said Street & Alexander
32 having been employed by said Barnes & Martin, if they were employed, and deny that they or either of them, or the said J. M. O'Connell ever promised to the said firm of Street & Alexander any fee whatever, either in money or otherwise.

These defendants admit that Barnes & Martin and J. M. O'Connell became and were entitled to one-fourth of said monies received by said defendants as the proceeds of said settlement and adjustment of their interest in said property, but deny that they were ever entitled to any stock whatever of any kind or of any corporation.

These defendants further deny that during the month of April, 1906, or at any other time, J. M. O'Connell ever received any monies, other than hereinbefore specified, and deny that he ever did receive any stock at all on account of said contract of employment as attorney for said defendants, and deny that said O'Connell now holds the same or any part thereof, or has or retains all or any of said proceeds or all of said monies or any of it, and deny that Mary E. Street as executrix or otherwise, or J. L. B. Alexander is entitled to one third or any other portion of the money or property turned over to said J. M. O'Connell or to the said Barnes & Martin.

These defendants further deny, on information and belief that intervenors have any interest in the matter in litigation and deny that J. M. O'Connell is a necessary or proper party or has
33 any interest in said litigation, and deny that they are entitled to any acounting as against these defendants or either one of them.

Wherefore, these defendants pray that they be dismissed hence without day, and recover of the intervenors their costs in this action incurred and expended, and that intervenors recover nothing.

BEN GOODRICH,
J. M. O'CONNELL,
Attorneys for Defendants.

TERRITORY OF ARIZONA,
County of Cochise, ss:

J. M. O'Connell, being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action. That he has read the foregoing answer and knows the contents thereof; and that the same is true in substance and in fact except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

J. M. O'CONNELL,

Subscribed and Sworn to before me this 15 day of December, 1909.

[SEAL.] MAY CHAMBERLIN,
Notary Public.

My commission expires Sep. 13, 1912.

Filed Dec. 15, 1909.

34 (Title of Court and Cause.)

Comes now the intervenors herein and move to strike the demurrer of the defendants herein from the record, said demurrer being attempted to be interposed by amended answer of defendants to the amended complaint of intervenors herein, for the reasons

1. The same is not a proper amendment to defendants' original answer herein.
2. That the demurrer attempted to be interposed comes too late and no right now exists for its interposition.
3. That the defendants by filing their original answer herein and joining issues with the intervenors upon intervenors' amended complaint waived the right to demur to the same.
4. That the demurrer attempted to be interposed is sham and frivolous and not taken in good faith.
5. That said demurrer attempted to be interposed is not taken in good faith to defend, further or sustain any rights or alleged rights of defendants herein but for the purpose of attempting to defeat the rights of intervenors herein against the plaintiff herein.

Respectfully submitted,
ALEXANDER & CHRISTY,
P. H. HAYES,
Attorneys for Intervenors.

Filed Jan. 7, 1910.

35 Here follows Argument and Brief of Intervenors filed April 27, 1910 which is omitted from the Transcript by direction of Attorney for Appellant.

Judgment.

(Title of Cause.)

This cause came on regularly for hearing on the 7th day of January, 1910, before the Court sitting without a jury, a trial by jury *have* been previously waived by the respective parties to said action; the plaintiff Belle J. Barnes appearing by E. S. Ives, her attorney, the intervenors, J. L. B. Alexander and Mary E. Street, executrix of Webster Street, deceased, appearing by Alexander & Christy and P. H. Hayes, their attorneys, and the defendants, L. C. Shattuck, H. R. Hanninger and Emil Marks, appearing by Ben Goodrich and J. M. O'Connell, their attorneys, witnesses being sworn, examined, and testifying and documentary evidence being introduced on be-

half of the respective parties to said action, and the said testimony and evidence and the argument of counsel for the respective parties thereupon being heard and the case being closed and sub-
36 mitted to the Court for its consideration and decision, and the Court having considered the same and being fully advised in the premises, now, on this 27th day of April, A. D. 1910, the Court finds for the said intervenors and against the said plaintiff;

Wherefore, by reason of the premises and the law, it is ordered, adjudged and decreed that J. L. B. Alexander and Mary E. Street, executrix of Webster Street, deceased, the intervenors in this cause, have and recover of and from Belle J. Barnes, the plaintiff in this cause, the sum of Six Thousand Two Hundred and Fifty Dollars, with legal interest thereon from the first day of May, 1909, until paid, and that said intervenors have execution therefor, and that the intervenors take nothing against the defendants.

Done in open court this 27th day of April, 1910.

FLETCHER M. DOAN,
District Judge.

(Filed April 27, 1910.)

Motion for New Trial.

(Title of Cause.)

Now comes the plaintiff, Belle J. Barnes, and moves for new trial upon the following grounds:

1. That the Court erred in admitting evidence.
2. That the Court erred in rejecting evidence.
3. That the evidence does not sustain the judgment.
4. That the judgment is contrary to law.

EUGENE S. IVES,
Attorney for Plaintiff, Belle J. Barnes.

Filed April 30, 1910.

37 This Agreement, made the 22nd day of January, A. D. 1904, between Martin Costello and Mary Costello, his wife, of Tombstone, Arizona, parties of the first part, and L. C. Shattuck, H. R. Hanninger and Emil Marks, of Bisbee, Arizona, parties of the second part, Witnesseth:

That Whereas, there is now pending in the Supreme Court of the United States, and in the Supreme Court of the Territory of Arizona two suits involving the rights of the parties hereto in and to certain lands in the Warren Mining District, Cochise County, Arizona, claimed by said Costello as the Roy and Leo Mining claims, and by said Shattuck, as the Triangle and Iron Prince Mining Claim and by said Shattuck, Hanninger and Marks as the Standard Quartz Mining Claim.

And Whereas, the said parties are desirous of settling the said suits, and making a sale of said property, if possible.

Now Therefore, said parties of the first part for and in consideration of the sum of one dollar to them in hand paid by said second

parties, the receipt whereof is hereby acknowledged, hereby agree that in case said second parties sign stipulations to be filed in said courts for the dismissal of said suits, so that the final proof may be made by said Martin Costello in the U. S. Land Office at Tucson, and final Receiver's Receipt issued to him for said Roy and Leo mining claims as applied for patent by him, then and in that event said parties of the first part agree to grant, bargain, sell and
38 convey to the second parties all their right, title and interest in and to the said Roy and Leo mining claims, for the sum of one hundred and sixty-nine thousand, one hundred and twelve ($169,112.00) dollars, payable as follows: Ten per cent (10%) thereof within ten days after written notice thereof, being given said second parties that final Receiver's Receipt has been issued to said Costello for said Roy and Leo mining claims; ten per cent (10%) thereof within one year after the date of the first payment, and the balance within two and one-half years after the date of said first payment. in case patent be issued by the United States to the said Martin Costello for said Roy and Leo mining claims, but in case said patent shall not have been issued at that time, then said final payment to be made within ten days after written notice has been given said second parties of its receipt.

All of said payments to be made to the credit of Martin Costello at the Bank of Bisbee, Bisbee, Arizona.

The stipulations hereinbefore mentioned shall be for the dismissal of the appeal of L. C. Shattuck now pending in the Supreme Court of the United States in the case of L. C. Shattuck against Martin Costello, and for the dismissal of the appeal now pending in the Supreme Court of the Territory of Arizona in the case of Emil Marks, H. R. Hanninger and L. C. Shattuck against Martin Costello.

And upon the return of said cases to the district Court of Cochise County that a judgment shall be entered therein for the defendant, Martin Costello for the relief asked for in his cross complaint, provided however, that each party shall pay their own costs in both cases.

And upon the signing of said stipulation for the dismissal of said suits as above set forth, parties of the first part agree to execute, acknowledge and deliver to said Bank of Bisbee in escrow a deed conveying all of their right, title and interest in and to said claims, or which may hereafter be acquired by them by reason of the
39 issuance of patent by the United States for said Roy and Leo mining claims to the said Martin Costello to the said L. C. Shattuck, H. R. Hanninger and Emil Marks with instructions to said bank to deliver said deed to said second parties or their assigns upon payment of the amounts at the time and in the manner hereinbefore set forth, and in case said payments are not made as herein mentioned, the said deed to be returned to said Martin Costello.

It is further understood and agreed that in case said first payment shall be made at the time mentioned, then said second parties, or their assigns shall have the right to enter into, explore and develop said claims, provided, however, that all ore taken and removed from said

claims shall be stored at some convenient place on or adjacent to said claims, and shall become the property of said second parties or their assigns if the payments are made as herein stipulated, otherwise to remain the property of said first parties.

And provided further that said second parties or their assigns may remove not more than two hundred tons of ore from said claims for assay and smelter tests.

And provided further that said Martin Costello or his agent, may at all reasonable times visit the workings on said claims for the purpose of inspection.

It is further understood and agreed that in case said payments shall not be made as herein stipulated, and the deed to said Roy and Leo mining claims hereinbefore mentioned shall be returned to said Martin Costello, then said parties of the first part agree to execute, acknowledge and deliver to said second parties, a good and sufficient deed, conveying to said second parties six (6) acres in rectangular form along the north side line of said Leo mining claim adjacent to the Triangle, Iron Prince and Copper Rock Mining Claims.

40 It is further understood and agreed that in case said second parties shall fail to sign the stipulations for the dismissal of said suits as herein set forth within thirty days from date hereof, then this agreement shall be null and void, and said suits shall be continued the same as if this agreement had not been made.

In Witness Whereof, the said parties have hereunto set their hands the day and year first above written.

MARTIN COSTELLO,
MARY COSTELLO,
By MARTIN COSTELLO,
Her Attorney in Fact.
EMIL MARKS.
L. C. SHATTUCK.
H. R. HANNINGER.

TERRITORY OF ARIZONA,
County of Cochise, ss:

Before me, Frank W. Goodbody, a Notary Public in and for the County of Cochise, Territory of Arizona, on this day personally appeared Martin Costello, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this 22nd day of January, A. D. 1904.

My Commission expires April 1st 1905.

FRANK W. GOODBODY,
Notary Public.

[SEAL.]

41 TERRITORY OF ARIZONA,
County of Cochise, ss:

Before me, Frank W. Goodbody, a Notary Public in and for the County of Cochise, Territory of Arizona, on this day personally ap-

peared Martin Costello, known to me to be the person whose name is subscribed to the within instrument, as the Attorney in Fact of Mary Costello, and acknowledged to me that he subscribed the name of Mary Costello thereto as principal and his own as Attorney in Fact for the purpose and consideration therein expressed.

Given under my hand and seal of office this 22nd day of January, A. D. 1904.

My commission expires April 1st, 1905.

[SEAL.] FRANK W. GOODBODY,
Notary Public.

TERRITORY OF ARIZONA,
County of Cochise, ss:

Before me, J. M. O'Connell, a Notary Public in and for the County of Cochise, Territory of Arizona, on this day personally appeared L. C. Shattuck, Emil Marks and H. R. Haninger, known — me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 10th day of February, 1904.

My Commission Expires, Jan. 6th, 1908.

[SEAL.] J. M. O'CONNELL,
Notary Public.

42 Filed and recorded at request of J. M. O'Connell, April 5th A. D. 1904 at 9 A. M. in Book 9 of Miscellaneous Records at pages 141, 142, 143, 144 and 145.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, C. A. McDonald, County Recorder in and for the County and Territory aforesaid, do hereby certify that I have compared the annexed and foregoing copy with the original agreement, between Martin Costello and Mary Costello and L. C. Shattuck, H. R. Haniger and Emil Marks, filed for record in my office on the 5th day of April A. D. 1904, at 9 A. M., and recorded in Book 9 Miscellaneous Records at pages 141, 142, 143, 144 and 145, and that the same is a full, true and correct copy of said original and of the whole thereof.

Given under my hand and official seal this the 27th day of April A. D. 1910.

[SEAL.] C. A. McDONALD,
County Recorder.

Filed April 27, 1910.

In the District Court of the Second Judicial District of the Territory of Arizona, County of Cochise.

BELLE J. BARNES, Plaintiff; J. L. B. ALEXANDER and MARY E. STREET, Executrix of WEBSTER STREET, Deceased, Intervenors,

vs.

L. C. SHATTUCK, H. R. HANNINGER, and EMIL MARKS, Defendants.

I, the undersigned Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the
43 County of Cochise, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book 6 of said Court, at page 341.

And I further certify that the foregoing papers hereto annexed constitute the Judgment Roll in said action.

Witness my hand and the seal of the District Court this 3rd day of August, 1910.

[SEAL.] A. H. GARDNER, *Clerk.*
By W. J. HICKS,
Deputy Clerk.

44 Be it remembered that on to-wit: the seventeenth day of September, 1910, came the Appellant by her Attorney and filed in the office of the Clerk of the Supreme Court of the Territory of Arizona, certain Plaintiff's and Defendant's Exhibits in words and figures following to-wit:

EXHIBIT 1.

Webster Street. J. L. B. Alexander.

Law Offices of Street and Alexander, 302-303 Fleming Bldg.

PHŒNIX, ARIZONA, *October* 9, 1907.

J. M. O'Connell, Esq., Bisbee, Arizona.

SIR: Some time in the year 1900 or thereabouts, a certain case was brought in the District Court of Cochise County at Tombstone, wherein one Martin Costello was plaintiff and L. C. Shattuck, Marks and Hanninger were defendants, which suit involved the title to the Triangle and the Standard Quartz Mining Claims in said county. At the time Mr. Shattuck employed the law firm of Barnes & Martin of Tucson to represent him, Marks and Hanninger in said case, and agreed with Judge William H. Barnes, the senior member of said law firm to pay said law firm a contingent fee of one-fourth of whatever said defendants might recover in said action, it also ap-
45 pears that afterwards Judge Barnes secured your services to assist him in said case and agreed to give you one-third of said contingent fee.

This case was afterwards tried in Cochise County and a judgment was rendered in favor of Costello against said defendants in respect

of the Triangle claim, and a judgment was rendered in favor of defendants in respect of the Standard Quartz claim. An appeal was taken by Judge Barnes in the case decided against Shattuck and an appeal was taken by Costello in the case decided against him. This appeal Judge Barnes brought to the Supreme Court of Arizona, and employed the firm of Street and Alexander to assist him in said appeal before the Supreme Court, and agreed to pay said law firm of Street and Alexander, one-third of the said contingent fee agreed to be paid him by said defendants. Afterwards the case was argued before the Supreme Court by the firm of Street and Alexander, but it having appeared in the argument of said case that the appeal bond had not been filed in time, the appeal was dismissed and subsequently, at the request of Judge Barnes, the firm of Street and Alexander perfected an appeal from the Supreme Court of Arizona to the Supreme Court of the United States in said case, and while said appeal was pending to the Supreme Court of the United States the litigation was settled between the plaintiff and defendants in
46 said case, whereby it appears the sum of $75,000 was agreed to be paid by the plaintiff to the defendants; whereupon the appeal taken to the Supreme Court of the United States by the defendants was dismissed and also the appeal taken by the plaintiff to the Supreme Court of Arizona was also dismissed; and it also appears that since that time the said sum of $75,000 has been paid to the said defendants in said case, the last payment thereof having been made on October last, and that the said defendants Shattuck, Marks and Hanninger have paid one-fourth of said amount, or $18,750 to yourself, as the fee agreed to be paid to the firm of Barnes & Martin, to be by you paid to the attorneys in the case entitled thereto, and that you have retained of said fee, as your part thereof, $6250, and have paid to John H. Martin, the junior member of the firm of Barnes & Martin, the sum of $1875, and that you now have in your possession of said fee, $10,625.

We hereby notify you that we claim one-third of the said contingent fee paid you of $18,750. to-wit, $6250 as our part of the said fee as agreed to be paid to us by William H. Barnes, the senior member of the law firm of Barnes and Martin, for our services in said case; and we hereby now demand of you that you pay us said sum of $6250, and that you pay the same to no one else; otherwise, we shall hold you responsible to us for said sum, to-wit, $6250. Please acknowledge receipt.

Yours truly,

WEBSTER STREET,
J. L. B. ALEXANDER,

TUCSON, ARIZONA, *Jan.* 7, 1903.

A. F.

47 EXHIBIT 2.

(Blank of Western Union Telegraph Company.)

6 Pd. Jan. 6/03.
HOLLAND HOUSE.

Received at Benson, Arizona.

John H. Martin:

I win Standard Quartz case with jury.

W. H. BARNES.

EXHIBIT 3.

(Blank of Western Union Telegraph Company.)

JANUARY 7TH, 1903.

Judge Wm. H. Barnes, Tucson, Ariz.

Congratulate you; great victory as wins all three cases. Send my share Henrietta have good opportunity to invest; also amount take up Guardian note.

Collect. J. H. M.

EXHIBIT 4.

TUCSON, ARIZONA, JAN. 7, 1903.

"Dr. John:

Since writing you this A. M. I won both Shattuck cases with jury. He says we are to have one-fourth of the ground.

Belle is feeling very blue and I am very sorry for her, it breaks me all up. I do not know what to do. I am worse hit than I ever was. As ever.

W. H. BARNES.

48 EXHIBIT A.

JANUARY 26, 1903.

Hon. Webster Street, Phœnix, Arizona.

MY DEAR JUDGE: I received your letter and have considered it well. I think that you are right about it; that the Board intend to compel the Court to take the full responsibility and I think the Court, on the other hand, do not wish to do it until they have to. I think, when they do have to, there will be no doubt about the result. I am to have an interview with Judge Dillon to-morrow on the question whether we shall not get out contempt proceedings in the Supreme Court of the United States against everybody out there. That we will consider, but I think that your plan is the wisest. Confidentially, the President and Attorney General were both interviewed yesterday, and I think that the appointees out there will hear something drop from Washington. The expression was made that

it was an unheard of proposition to give a Board sixty days to obey a mandate, and I am sure that is the view of the Attorney General, and that they think that the Court and Board are, all of them, "monkeying" with the decision of the Supreme Court. This is for you or me alone. We want, however, to get in action as quickly as we can, because if we wait until after Statehood, the bonds will not be worth so much as they would be if issued now. While I do not think, and it is not generally believed here, that Quay will
49 succeed to pass his bill, yet he may do so, and if he does and we not have the bonds, will make trouble as to the value of the bonds when they shall be issued.

With reference to the Tombstone case, I think you are very fortunate in the situation, and we will get their evidence in good shape when I come out there.

I find the case of Swan v. Hill, 155 U. S., 394, practically holds that, where a bond is defective, if a motion is made to file a good bond, it will be allowed. That means that it has not jurisdiction of the subject matter, but has jurisdiction of the person, which may be waived by the parties themselves.

Again, it does seem to me that the stipulation by which the parties were to have all their rights of appeal preserved, even though the Court decided on vacation, includes the right to file a bond and waive the question of time. I remember, so does Mr. Martin, that he prepared the bond and got it signed as quickly as he could, and I think that Reilly's stipulation waived all questions of time, and that we finally filed the bond within a reasonable time under that stipulation, which is all that could be required, and that that stipulation is a complete waiver of the bond which was filed in a reasonable time thereafter. I make these suggestions to you, but I have no doubt that you have thought of stronger reasons than these.

Thanking you for your kindness in all these matters and remember that I shall find a way to reimburse you therefor.

50 We found the girls well. We were with them both yesterday and the day before. Willi- seems to be apparently perfectly well. Mrs. Barnes is getting along nicely, but she does not dare go out in the cold, chilly air now. It has been snowing for a day or two and it is thawing to-day and the cold here makes her throat sore.

Again thanking you, I am,
Very truly, your friend,

——— ———.

EXHIBIT B.

FEBRUARY 21, 1902.

I make this my last will.

I give bequeath and devise to my wife Belle J. Barnes if she survive me all my property of every kind and character. If she do not survive me than I give bequeath and devise all my property to Miss Willie B. Martin, Miss Madge Martin and Master James K. Martin children of John H. Martin and Jose Belle Martin all my property to be divided equally between them. If my wife survive me

she shall be the executrix of my will without bond. If not then said John H. & Jose B. Martin shall be executors hereof without bond & with full power to sell or dispose of any property of which I may die seized as they may see proper. I make this with my own hand and declare the same.

WILLIAM HENRY BARNES.

Endorsements.

In the Probate Court of the County of Pima, Territory of
51 Arizona. In the matter of the estate of William H. Barnes, deceased. Last Will and Testament. Filed in the Probate Court of Pima County, Arizona Ter., November 17, 1904. W. J. Kirkpatrick By Ex Officio Clerk, By —— —— Deputy. Recorded Record of Will No. 3, Pg. 141.

In the Probate Court of the County of Pima, Territory of Arizona.

In the Matter of the Estate of WILLIAM H. BARNES, Deceased.

Certificate.

I, William F. Cooper, Judge and Ex-officio Clerk of the Probate Court in and for the County of Pima, Territory of Arizona do hereby certify that the foregoing is a full, true and correct copy of the original Will of William H. Barnes, deceased, in the matter of the Estate of William H. Barnes, deceased, as the same remains of record and on file in the office of said Clerk. I further certify the same has not been revoked. Witness my hand and the seal of my office this 6th day of January, 1910.

[SEAL.] WILLIAM F. COOPER,
Judge and Ex-Officio Clerk of the Probate Court.

EXHIBIT C.

In the Probate Court of the County of Pima, Territory of Arizona.

In the Matter of the Estate of WILLIAM H. BARNES, Deceased.

M. P. Freeman, administrator with will annexed of the Estate of William H. Barnes, deceased, having on the 9th day of April, 1906, filed in this Court his petition praying for an order finally distributing said estate, to Belle J. Barnes, widow of the said William H. Barnes, deceased, being the sole heir, legatee and devisee under the will of said deceased, which said will has heretofore been duly probated before this Court, and said Belle J. Barnes having also on the 9th, day of April 1906, filed her
52 petition praying for an order finally distributing said estate and praying that the petition of said administrator be granted,

without any further notice and that this Court do forthwith distribute all of the estate of said decedent now in the hands of said administrator as well as all property of decedent not included in the inventory on file herein, to her the said Belle J. Barnes, sole heir and legatee; and the said petition coming on regularly to be heard this 10th day of April, 1906, the said administrator appearing by Selim Franklin Esq., his attorney, and Belle J. Barnes, sole heir and legatee appearing in her own proper person, the Court proceeded to the hearing of said petition, and it appearing to the Court that the property of said estate is now ready for distribution and that said estate is now in condition to be closed:

That the said William H. Barnes died testate in the City of Tucson, County of Pima, Territory of Arizona, on the 10th day of November, 1904, leaving a will which was duly probated by this Court on the 18th day of November, 1904; that under and by virtue of said will, said Belle J. Barnes, widow of said decedent is his sole heir and legatee:

That M. P. Freeman, administrator with will annexed of the estate of said decedent, has heretofore filed his final account, which thereafter and on the 7th day of March, 1906, was duly allowed;

53 that since the allowance of said account, said administrator has expended as necessary expenses of administration the sum of $43.30, being the fees of this Court and the Clerk thereof; that the said administrator has paid all of the debts of said estate as allowed by this Court, and has delivered to L. C. Hughes One thousand shares of the capital stock of the Cieneguita Copper Company, as heretofore ordered by this Court; that said administrator has received no compensation for his services as such administrator and that the sum of $2500.00 is a reasonable fee for said services, being less than one-half the commission as allowed by law.

That said Belle J. Barnes has assigned to J. C. Campbell One thousand shares of the capital stock of the Cieneguita Copper Company, and that the distribution to her of said shares of stock should be made subject to such assignment, or the One thousand shares aforesaid should be distributed to said J. C. Campbell as assignee.

Now, therefore, it is hereby ordered adjudged and decreed that all of the property of the estate of said William H. Barnes, deceased, personal and mixed, and now remaining in the hands of said administrator, and any and all other property not now known or distributed which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed to Belle J. Barnes, the sole heir, legatee and devisee of the said William H. Barnes, deceased, excepting however, One thousand shares of the Fifty thousand shares of the capital stock of the Cieneguita Copper Company, mentioned and described in the in-

54 ventory herein, which said One thousand shares of the stock of the Cieneguita Copper Company is herewith distributed to J. C. Campbell of San Francisco, in the State of California, under and in pursuance of a certain agreement made between said J. C. Campbell and said Belle J. Barnes, a copy of which is annexed to

the final report of M. P. Freeman, administrator, and which is now on file herein.

It is further ordered adjudged and decreed that the said M. P. Freeman, administrator as aforesaid shall forthwith transfer and deliver to said Belle J. Barnes, all property, real and personal which is now in his hands, as such administrator, or which has come into his possession, or under his control by virtue of his being the administrator of said estate, and shall deliver unto her, the said Belle J. Barnes all certificates for shares of stock in corporations, which have come into his possession by virtue of his being administrator of said estate.

And it is further ordered that the accruing costs of administration as aforesaid be paid out of any moneys in the hands of said administrator before making final distribution thereof.

It is further ordered that as the said M. P. Freeman has filed in this Court his written waiver of the fees and compensation to which he is entitled as such administrator, that said compensation be deemed and considered paid.

It further ordered that upon the said M. P. Freeman,
55 filing the receipt of said Belle J. Barnes, for the property distributed as aforesaid he be discharged from his trust as administrator; that his bondsmen be released and discharged and that said estate be closed.

Done in Open Court this 10th day of April, 1906.

W. J. KIRKPATRICK,
Probate Judge.

Endorsements.

In the Probate Court, Pima County, Arizona. In the matter of the Estate of William H. Barnes, Deceased. Decree of Distribution. Filed April 10, 1906. W. J. Kirkpatrick Ex-Officio Clerk Probate Court. Recorded Journal No. 10, Page- No. 52-53.

In the Probate Court of the County of Pima, Territory of Arizona.

In the Matter of the Estate of WILLIAM H. BARNES, Deceased.

Certificate.

I, William F. Cooper, Judge and Ex-Officio Clerk of the Probate Court in and for the County of Pima, Territory of Arizona, do hereby certify that the foregoing is a full, true and correct copy of the original Decree of Final Distribution in the matter of the Estate of William H. Barnes, deceased, as the same remains of record and on file in the office of said Clerk. I further certify the same has not been revoked.

Witness my hand and the seal of my office, this 6th day of January, A. D. 1910.

[SEAL.]

WILLIAM F. COOPER,
Judge and ex-Officio Clerk of the Probate Court.

56 EXHIBIT D.

(Copy.)

M'CH 9, 1905.

Messrs. Hereford & Hazzard, Tucson, Arizona.

GENTLEMEN: I enclose you herewith a letter from J. M. O'Connell, of Bisbee, Arizona, covering two agreements with reference to a group of mining claims in Bisbee. This man O'Connell, as you will probably recall, read law in our office in Tucson a number of years ago, and when we were employed to take up the matters referred to in these agreements he was then in Bisbee and became associated with us in the cases, and there never was any agreement whatever in reference to a fee between our firm and Mr. O'Connell.

Now that the Judge is dead he insists that one-half of the fee is his by agreement with Judge Barnes. I know this is not so, but to avoid the tying up of the money for any considerable length of time, I would be perfectly willing to settle the matter with him on a basis of one-third, and if this is not satisfactory, I wish you then to bring injunction suit against the payment of any moneys to him on account of law fees. He has, according to his own letter, $625, of which he admits $312 is due us, while I insist two-thirds is due us. You might take the matter up with him and let me know what can be done about it. The next payment will be in April and
57 the final payment in October. I have no doubt that the payments will be made.

Very truly yours,

(Signed) JOHN H. MARTIN.

(enc)

EXHIBIT D.

Fletcher M. Doan, Associate Justice, Supreme Court, Judge Second Judicial District, Arizona Territory.

DEPARTMENT OF JUSTICE,
TOMBSTONE, ARIZONA, *June 20th*, 1903.

Hon. Webster Street, Phœnix, Arizona.

DEAR JUDGE: Please find enclosed bond in the case of Shattuck against Costello duly approved as requested.

The Clerk forwarded the papers in last night's mail to the Clerk of the Supreme Court.

I am quite busily engaged in Court here at this time.

Yours very truly,

FLETCHER M. DOAN, *Judge*.

(1 encl.)

58 And on the same day, to-wit: the seventeenth day of September, 1910, came the appellant by her attorney, and filed in the clerk's office of said Court in said entitled cause a certified

copy of the Minute Entries, Supersedeas Bond on Appeal and Reporter's Transcript of Testimony, in words and figures following, to-wit:

I, A. H. Gardner, Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, do hereby certify that the transcript of said cause was ordered by E. S. Ives, on the 26th day of July, A. D. 1910, and by me on the 15th day of September, A. D. 1910, delivered to the Clerk of the Supreme Court of the Territory of Arizona.

A. H. GARDNER,
Clerk District Court, Second Judicial District, Territory of Arizona, in and for the County of Cochise,
By W. E. BOGGS,
Deputy Clerk.

59 October Term, A. D. 1907, December 28, 1907.

SATURDAY, *December* 28, 1907.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pursuant to recess at 9:30 A. M.

Present:

Hon. Fletcher M. Doan, Judge.
F. W. Shelly, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to law.

5058.

BELLE J. BARNES
vs.
L. C. SHATTUCK.

Comes now J. L. B. Alexander, counsel for intervenors, and files and presents a motion and affidavit in intervention herein, which motion was by the Court granted.

April Term, A. D. 1908.

WEDNESDAY, *April 29th*, 1908.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pursuant to recess at 9:30 A. M.

60 Present:

Hon. Frederick S. Nave, Presiding Judge.
F. W. Shelly, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to law.

5058.

BELLE J. BARNES
vs.
L. C. SHATTUCK et al.

At the request of defendant, it is by the Court ordered that a trial by jury be had in this case.

April Term, A. D. 1908.

THURSDAY, *June 4th*, 1908.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pursuant to recess at 9 A. M.

Present:

Hon. Fletcher M. Doan, Judge.
F. W. Shelly, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to law.

61 5058.

BELLE J. BARNES
vs.
L. C. SHATTUCK et al.

Motion of defendant, ordered set for June 22nd, 1908.

April Term, A. D. 1908.

MONDAY, *June* 22, 1908.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pursuant to recess at 9 A. M.

Present:

Hon. Fletcher M. Doan, Judge.
F. W. Shelly, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to law.

5058.

BELLE J. BARNES
vs.
L. C. SHATTUCK et al.

By consent, it is by the Court ordered that this case be passed for a later setting.

October Term, A. D. 1908.

WEDNESDAY, *October* 28, 1908.

62 The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pursuant to recess at 9:30 A. M.

Present:

Hon. Fletcher M. Doan, Judge.
F. W. Shelly, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
Geo. B. Wilcox, Clerk.

Court was opened by the officers according to law.

5058.

BELLE BARNES
vs.
L. C. SHUTTUCK et al.

Comes now the defendant- herein, and demands a trial by a jury in this case, which is by the Court granted.

October Term, A. D. 1908.

THURSDAY, *December 10th*, 1908.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pursuant to recess at 9 o'clock A. M.

Present:

Hon. Fletcher M. Doan, Judge.
F. W. Shelly, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
Geo. B. Wilcox, —.

Court was duly opened by the officers according to law.

83 5058.

BELLE J. BARNES
vs.
L. C. SHATTUCK et al.

It is by the Court ordered that this case be passed for a setting.

October Term, A. D. 1909.

MONDAY, *November 29th*, 1909.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pursuant to recess at 9 A. M.

Present:

Hon. Fletcher M. Doan, Judge.
Jno. S. Williams, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to law.

5058.

BELLE J. BARNES
vs.
L. C. SHATTUCK et al.

By consent of parties herein, it is by the Court ordered that this case be, and the same is set for trial on January 4th, 1909.

84 October Term, A. D. 1909.

FRIDAY, *January 7th*, 1910.

The District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise, convened pursuant to recess at 9 o'clock A. M.

Present:

Hon. Fletcher M. Doan, Judge.
Jno. S. Williams, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to law.

5058.

BELLE J. BARNES
vs.
L. C. SHATTUCK et al. & Intervenors.

This case came on regularly for trial this day. Plaintiff appearing by counsel, Messrs. Ives and Martin, Esqs., and the defendants appearing by counsel, Ben Goodrich and J. M. O'Connell, Esqs., intervenor- appearing by counsel Messrs. Alexander and Christy, and B. H. Hayes, Esq., and all parties herein announcing ready, the trial of the case proceeds as follows:

Comes now counsel for plaintiff and presents demurrer to amended complaint in intervention, and after argument of respective counsel, *and* the Court being fully advised in the premises, overruled said demurrer, to which ruling the plaintiff *accepts*.

5058.

BELLE J. BARNES
vs.
L. C. SHATTUCK et al.

Court re-convened at 7 o'clock P. M. All officers present.

This cause having been continued to this hour, came on regularly for trial at this hour, and all parties herein being present and announcing ready, the trial of the case was resumed and proceeds as follows:

Comes now counsel for intervenor-, and moves the Court to strike from the files the amended answer of defendants to intervenors' amended complaint, and after argument of respective counsel, said motion is denied by the Court.

Comes now defendants and present demurrer to amended complaint in intervention, and the Court being fully advised overrules said demurrer.

Comes now counsel for plaintiff, and offers to dismiss as to defendants, to which the intervenors object.

Plaintiff offers no evidence, whereupon the intervenors, to maintain the issues on their part, calls as witnesses, J. M. O'Connell, C. A.

McDonald, and J. L. B. Alexander, who were duly sworn and examined.

66 Comes now intervenor-, and presents documentary evidence, whereupon intervenor- rests.

Comes now plaintiff and moves the Court to dismiss as to defendants, which said motion was taken under advisement by the Court.

Comes now the plaintiff and moves the Court for judgment as to plaintiff, and the Court being fully advised, denies said motion.

Comes now plaintiff, and to maintain the issues on her part, presents documentary evidence, and calls as witnesses John H. Martin, who was duly sworn, examined and cross examined, whereupon the plaintiff rests. Defendant- rests. Whereupon the case was taken under advisement by the Court.

October Term, A. D. 1909.

SATURDAY, *April* 23, 1910.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise convenes pursuant to recess at 9:30 o'clock A. M.

Present:
Hon. Fletcher M. Doan, Judge.
Jno. S. Williams, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
A. H. Gardner, Clerk.

Court was duly opened by the officers according to law.

67 5058.

BELLE J. BARNES
vs.
L. C. SHATTUCK et al.

It is by order of the Court — that this case be, and the same is hereby continued for the term.

April Term, A. D. 1910.

WEDNESDAY, *April* 27, 1910.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pursuant to recess at 9 o'clock A. M.

Present:
Hon. Fletcher M. Doan, Judge.
Jno. S. Williams, Distfl Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
A. H. Gardner, Clerk.

Court was duly opened by the officers according to law.

6058.

BELLE J. BARNES, Plaintiff; J. L. B. ALEXANDER et al., Intervenors,
vs.
L. C. SHATTUCK et al., Defendants.

Plaintiff by counsel, E. S. Ives, Esq., the intervenors, by
68 counsel, Messrs. Alexander and Christy and P. H. Hayes, and the defendants by Ben Goodrich and J. M. O'Connell present.

This cause having been heretofore tried and taken under advisement by the Court, *and* the Court having duly considered the same, orders that judgment be entered herein as follows:

It is by the Court ordered, adjudged and decreed that J. L. B. Alexander, and Mary E. Street, executrix of Webster Street, deceased, the intervenors in this cause, have and recover of and from Belle J. Barnes, the plaintiff in this cause the sum of six thousand, and two hundred and fifty dollars, with legal interest thereon from the first day of May, 1909, until paid, and that said intervenors have execution therefor, and that intervenors take nothing against the defendants.

Comes now counsel for the plaintiff, and presents motion for a new trial, and the Court being duly advised in the premises, denies said motion.

Whereupon plaintiff gives notice of appeal in open Court to the Supreme Court of the Territory of Arizona.

On motion of plaintiff, it is by the Court ordered that stay of execution of 60 days be granted.

69 April Term, A. D. 1910.

THURSDAY, *June* 16, 1910.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise convened pursuant to recess at 9 o'clock A. M.

Present:
Hon. Fletcher M. Doan, Judge.
Jno. S. Williams, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
A. H. Gardner, Clerk.

Court was duly opened by the officers according to law.

BELLE J. BARNES et al.
vs.
L. C. SHATTUCK et al.

It is ordered that 60 additional days be granted to file transcript of the evidence herein.

70 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BELLE J. BARNES, Plaintiff; J. L. B. ALEXANDER, MARY E. STREET, Executrix of Webster Street, Deceased, Intervenors.

vs.

L. C. SHATTUCK, H. R. HANNINGER, and EMIL MARKS, Defendants.

Supersedeas Bond on Appeal.

Know all men by these presents, That we, Belle J. Barnes, as principal, and L. H. Manning and Epes Randolph, as sureties, are held and firmly bound unto J. L. B. Alexander, and Mary E. Street, executrix of Webster Street, deceased, the Intervenors in the above entitled action, in the sum of fifteen thousand dollars ($15,000.00) lawful money of the United States of America, to be paid to the said J. L. B. Alexander, and Mary E. Street, Executrix of Webster Street, deceased, their heirs, executors, administrators, successors and assigns for which payment well and truly to be made we bind ourselves and our heirs, executors and administrators jointly and severally firmly by these presents.

Given under our hands this 11th day of June, 1910.

The condition of this obligation is such that whereas, on the 27th day of April, 1910, a judgment was rendered and entered in the District Court of the Second Judicial District of the Terri-

71 tory of Arizona, in and for the County of Cochise in the above entitled action, numbered 5058 of the files and records of said Court, wherein the said Belle J. Barnes was plaintiff, and the said J. L. B. Alexander, and Mary E. Street, executrix of Webster Street, deceased, were intervenors, and the said L. C. Shattuck, H. R. Henniger and Emil Marks were defendants, in favor of the said intervenors, and against the said plaintiff, in and by which judgment it was ordered, adjudged and decreed that said J. L. B. Alexander, and Mary E. Street, Executrix of said Webster Street, deceased, the intervenors in said cause, do have and recover of and from Belle J. Barnes, the plaintiff in said action, the sum of six thousand, two hundred and fifty dollars with legal interest thereon from the 1st day of May, 1909, until paid, and that said Intervenors have execution therefor, and that said intervenors take nothing against the defendants, and whereas, thereafter, and on the said 27th day of April, 1910, the said plaintiff, Belle J. Barnes, made a motion for a new trial of said action, and move- said Court to grant a new trial thereof, which motion was, on said last mentioned day by order of said Court, in all things denied, and

Whereas, thereupon, and on said 27th day of April, 1910, the said plaintiff, Belle J. Barnes, in open Court, gave notice of appeal to the Supreme Court of the Territory of Arizona from the said judgment and from the said order denying her said motion for a new trial of said action, which notice was thereupon noted

72 on the docket, and entered of record in said Court, and

Whereas, the said plaintiff Belle J. Barnes, now desires to

perfect said appeal, and to stay and suspend the execution of said judgment.

Now therefore, the said Belle J. Barnes, shall prosecute her said appeal from said judgment, and her appeal from said order denying her motion for a new trial of said action with effect, and shall pay all costs which have accrued in the Court below, or which may accrue in the Appellate Court upon either or both of said appeals, and in case a judgment of the Appellate Court shall be against her, upon either or both of said appeals if she shall perform its judgment, sentence or decree, and shall pay all such damages as may be awarded against her upon either or both of said appeals, then this obligation shall be void, otherwise to remain in full force and effect.

BELLE J. BARNES.
L. H. MANNING.
EPES RANDOLPH.

TERRITORY OF ARIZONA,
County of Pima, ss:

L. H. Manning and Epes Randolph being duly sworn each for himself, and not one for the other deposes and says: That he is a resident and freeholder of the County of Pima, and Territory of Arizona; that he is worth the sum of fifteen thousand dollars,
73 specified in the foregoing bond over and above all his just debts and liabilities and exclusive of property exempt from execution.

L. H. MANNING.
EPES RANDOLPH.

Subscribed and sworn to before me this 11th day of June, 1910.
[SEAL. J. B. HENDERSON,
Notary Public.

My commission expires May 9, 1911.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, A. H. Gardner, Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, do hereby certify that the above and foregoing sixteen pages of typewritten matter constitute and contain a full, true and correct copy of all minute entries, judgments and decrees of the Court, and also a full, true and correct copy of the Supersedeas Bond on Appeal in the cause wherein Belle J. Barnes is plaintiff, J. L. B. Alexander, and Mary E. Street, Executrix of Webster Street, deceased, Intervenors, vs. L. C. Shattuck, H. R. Henninger, and Emil Marks, are defendants, being cause No. 5058 of the files of said Court.

In witness whereof, I have hereunto set my hand and the
74 seal of said Court this 6th day of September, A. D. 1910.

[SEAL.] A. H. GARDNER,
Clerk District Court Second Judicial District of the Territory of Arizona in and for the County of Cochise,
W. E. BOGGS, *Deputy.*

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

BELLE J. BARNES, Plaintiff, and J. L. B. ALEXANDER and MARY E. STREET, Executrix of Webster Street, Deceased, Intervenors.
vs.
L. C. SHATTUCK, H. R. HANNINGER, EMIL MARKS, Defendants.

Reporter's Transcript of Evidence.

Trial in the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise, before His Honor Fletcher M. Doan, Judge, Sitting Without a jury at the Court House in the City of Tombstone, in said County and Territory, on the 7th Day of January, 1910.

Appearances:
For Plaintiff, Hon. E. S. Ives.
For Intervenors, Hon. J. L. B. Alexander, P. H. Hayes, Esq.
For the Defendants, J. M. O'Connell, Esq.

75 TOMBSTONE, ARIZONA, *Friday, January* 7, 1910—
7:00 o'Clock p. m.

All parties interested herein being now in Court, and having announced ready for trial, and after the argument of counsel regarding the pleadings, the trial of said cause proceeded before the Court, as follows:

Mr. IVES: It is suggested that we go on and take the testimony, and let these legal points be reserved.

The COURT: Very well.

Mr. IVES: I don't waive my right at this time.

The COURT: Your motion to dismiss is entered at this time, and I can hear the testimony.

Mr. IVES: Yes. We might make that disposition of it. You understand that I waive nothing by it. On the theory that we are going to dismiss, we have no evidence to offer.

The COURT: Very well, the intervenor may proceed.

Mr. ALEXANDER: It has been agreed beween counsel in this case that the following are the facts, and that no evidence need be introduced on the part of the intervenors in support thereof. This is paragraph two of the intervenors' amended complaint and intervention, wherein it is alleged that Webster Street and J. L. B. Alexander were attorneys at law, and legally engaged in the practice of law in the various courts of the Territory of Arizona, and in
76 the Supreme Court of the United States, and at all the times hereinafter mentioned were partners in the practice of law under the firm name of Street and Alexander, and having and maintaining an office in the City of Phœnix, and practicing in the various courts of Arizona, and the Supreme Court of the United

States, and that this partnership began some time in the year 1901, and continued until the first of September, 1907.

Also it will be admitted, and no proof will be offered in support of the allegation contained in paragraph twelve of the intervenors' amended complaint wherein it is alleged that said Webster Street in his life time made his last will, whereby he appointed Mary E. Street, one of the intervenors herein, executrix, and on or about the 22nd day of September, 1908, in the City of Los Angeles, in the State of California, said Webster Street died.

That on or about the 30th day of October, 1908, letters testamentary were issued to Mary E. Street, and thereupon the said Mary E. Street qualified as such executrix, and entered upon the discharge of the duties as such executrix, and that said letters have not been revoked.

Mr. IVES: That is admitted.

Mr. ALEXANDER: And that she is now the duly appointed, qualified and acting executrix of the will of Webster Street, deceased.

Mr. IVES: That is admitted.

Mr. ALEXANDER: Now, Mr. Ives, taking your complaint.

77 Mr. IVES: We will admit everything that is in our complaint.

Mr. ALEXANDER: Yes, then we will ask if everything in your complaint is admitted?

Mr. IVES: Yes.

Mr. ALEXANDER: That you admit it?

Mr. IVES: Yes sir.

Mr. O'CONNELL: The defendants don't admit the complaint. Certain facts we are willing to admit in behalf of the complaint.

Mr. ALEXANDER: Will you admit that prior to the 10th day of November, 1901, the said defendants employed the said William H. Barnes and John H. Martin, co-partners as aforesaid to act as their attorneys in and about certain litigation then pending, or about to be commenced in this court between the said above named defendants L. C. Shattuck, H. R. Henniger and Emile Marks and one Martin Costello, and certain other parties, involving the title to certain mining property, to-wit: The "Roy" and "Leo" mining claims, which were in the Warren Mining District, Cochise County, Arizona, and that said William H. Barnes and John H. Martin accepted said employment, and thereafter acted as attorneys for the above named defendants in and about said litigation. It is further admitted in paragraph two of plaintiff's complaint——

Mr. IVES: Here is the point. The plaintiff does not allege everything that is admitted in his complaint. There are certain matters

78 that we alleged, and we found that we were wrong in. For instance, this two or three hundred dollars' worth of stock, and we found that we were wrong, and so we withdraw that. I was hasty, that is all.

The COURT: You admit everything in your complaint except what you have since learned——

Mr. ALEXANDER: In error.

Mr. IVES: Yes sir.

Mr. ALEXANDER: Well, do you admit paragraph two of plaintiff's complaint?

Mr. IVES: Yes.

Mr. ALEXANDER: Now, I understand that paragraph two of plaintiff's complaint is admitted by the parties?

Mr. IVES: Yes, by both the plaintiff and the defendant.

Mr. ALEXANDER: Wherein it is alleged that William H. Barnes, who died testate at the County of Pima, Territory of Arizona, on the tenth day of November, 1904. That prior to his death said W. H. Barnes and John H. Martin, were attorneys at law duly admitted to practice in all the courts of said Territory under the firm name and style of Barnes and Martin at the City of Tucson, County of Pima, and Territory of Arizona.

Mr. IVES: That is admitted.

Mr. ALEXANDER: It is also admitted by all parties that paragraph four of plaintiff's complaint——

Mr. O'CONNELL: Paragraph three.

Mr. ALEXANDER: I have read that.

Mr. O'CONNELL: Not paragraph four, no sir.

79 The COURT: What do you admit out of paragraph four?

Mr. O'CONNELL: Nothing in paragraph four.

Mr. ALEXANDER: As to the defendants, you don't admit that?

Mr. O'CONNELL: We don't admit that.

Mr. ALEXANDER: Do you admit that they were employed?

Mr. O'CONNELL: We admit the employment, but not that they were to receive one-fourth.

Mr. IVES: I think we will get along faster, Captain, if you put a witness on the stand. From time to time, certain facts you want admitted, we will admit them.

Mr. ALEXANDER: Well, Mr. O'Connell, take the stand.

J. M. O'CONNELL, being called as a witness on behalf of the Intervenors, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ALEXANDER:

Q. Why, Mr. O'Connell, you are a resident of Bisbee, I believe?
A. Yes sir.
Q. You are an attorney at law?
A. Yes sir.
Q. And have been practicing at Bisbee?
A. Yes sir.
Q. For how long have you practiced law there?
A. Ten years.
Q. You knew Mr. W. H. Barnes, during his life time?

A. I did.

80 Q. And Mr. John H. Martin?

A. Yes sir.

Q. And were you acquainted with the firm of Barnes and Martin?
A. Yes sir.
Q. That is a law firm?
A. Yes sir.

Q. And you knew the defendants here, L. C. Shattuck, H. R. Henniger and Emil Marks?
A. Yes sir.
Q. You have known them for a good many years?
A. Ten years.
Q. They are also residents of Bisbee, are they not?
A. Yes sir.
Q. Now, you were—in 1901 you were acquainted with them?
A. I was.
Q. And were you in any way engaged with these defendants I have just named?
A. I was.
Q. With whom were you engaged?
A. Barnes and Martin.
Q. And who employed you in that position?
A. I was first employed by Shattuck and Marks and Henniger to assist Barnes and Martin in the prosecution of the defense—no, it was in the prosecution of three cases, three adverse cases that they had against Martin Costello pending in the District Court of Cochise County. The three cases were known as the "Triangle case,"
81 the "Standard Quartz" and the "Iron Prince" cases.
Q. Did Barnes and Martin have anything to do with your employment in the prosecution of those cases?
A. After my employment by Shattuck, Henniger and Marks, upon coming over to Tombstone, the understanding between Barnes and Martin as to their fees in the matter——
Q. Not what the understanding was.
A. Well, the agreement was made right here in Tombstone that I was to receive one-third of the fee that they should be paid for their services to be rendered—rendered and to be rendered.
Q. One-third of what fee?
A. Of the fee that we would be paid.
Q. To whom?
A. To Barnes and Martin.
Q. How much did Barnes and Martin receive?
A. In the two cases.
Q. How much were they to receive?
A. They were to receive one-fourth of any amount that might be received by Shattuck, Marks and Henniger on the "Standard Quartz" case. The other cases were different parties.
Q. I haven't asked you about this?
A. Just on that one case, the "Standard Quartz" case it was to be.
Q. You were employed in that case?
82 A. I was.
Q. Who was to pay you?
A. I was to receive one-third of the attorney fee that would be paid to Barnes and Martin.
Q. With whom did you arrange for that?
A. With Shattuck, Marks and Henniger, and Barnes and Martin, they were all present.
Q. In other words, the arrangement was that Barnes and Martin

were to receive one-fourth of anything that would be realized for Shattuck, Henniger and Marks in the litigation?

A. Yes sir.

Q. And you were to receive one-third of that?

A. Yes sir.

Q. Well, you engaged with Barnes and Martin in the litigation of these cases?

A. I did.

Q. In this court?

A. Yes sir.

Q. Well, subsequently were these cases tried in this court?

A. The "Standard Quartz" case was tried here in this court, the other two cases—the "Triangle" case was also tried in this court, and Marks and Henniger, the defendants interested in the "Triangle" case——

Q. Well, they were tried here?

A. Two of the cases were.

Q. The "Triangle" case?

88 A. And the "Standard Quartz" case.

Q. And a judgment was rendered in the cases?

A. Yes sir.

Q. What became of those cases?

A. The "Triangle" case, the judgment of this court was in favor of Costello, and afterwards an appeal was taken to the Supreme Court of the Territory, and the case was reversed, and afterwards on petition for rehearing the case was dismissed.

Q. What became of the other case, the "Standard" case?

A. The "Standard Quartz" case was tried in this court by Judge Barnes and myself, Mr. Martin was away at that time in the east.

Q. What became of that case?

A. Well, I will come to it; I will tell you the story.

Q. I don't want any story; what became of the case?

A. The judgment was in favor of Shattuck, Marks and Henniger, and was appealed to the Supreme Court, and the——

Q. Of Arizona?

A. Of Arizona, and the appeal was pending in the winter, or January of 1904.

Q. Was the case—now, who were the plaintiffs in that case?

A. Shattuck, Marks and Henniger.

Q. That is the "Standard" case?

A. That is the "Standard Quartz" case.

Q. Now, the "Triangle" case?

A. "Standard Quartz", Francis A. Unons and Shattuck.

84 Q. And Shattuck?

A. Yes sir.

Q. And this was begun, or represented in the Supreme Court of the Territory by yourself, Barnes and Martin?

A. Well, I don't know as my name appears on the records in the Supreme Court.

Q. You were aiding and assisting Barnes and Martin?

A. Aiding and assisting.

Q. In and about this litigation?
A. All along.
Q. What property was involved; what was the names of the mines involved in this "Triangle" case?
A. It was an adverse on behalf of Uvens and Shattuck against the patent applied for by Martin Costello for the "Roy" and "Leo" claims in the Warren Mining District.
Q. And what was involved; what claims were involved in the case they called the "Standard Quartz" case?
A. The "Standard Quartz" case was a like adverse against Martin Costello covering a portion of the "Roy" and "Leo" claims.
Q. Covering the same grounds?
A. Not covering the same ground.
Q. Some of it covered?
A. Very little.
Q. It was a proceeding against the "Roy" and "Leo" claims?
A. Yes, but not the same ground.
Q. Do you know what became of the case, the "Standard"
85 case in the Supreme Court of Arizona. You stated it was reversed.
A. The appeal was dismissed by the failure to file the bond within the statutory time.
Q. You didn't appear in the Supreme Court in that case?
A. No.
Q. What became of that case afterwards?
A. That case was appealed to the Supreme Court of the United States on behalf of Shattuck and Uvens.
Q. Well now, do you know who appealed it?
A. The appeal was perfected by Judge Street; the appeal to the Supreme Court of the United States was perfected by Judge Street.
Q. The intervenor here in this case?
A. Yes sir.
Q. One of the intervenors?
A. Yes sir.
Q. Intestate?
A. Yes, the late Judge Street.
Q. Named in the original petition for intervention?
A. Yes sir.
Q. And the appeal was perfected by him was it?
A. It was.
Q. Now do you know when that was done?
A. My recollection is that that was done in the fall of 1902, or 1901.
Q. Wasn't that done in the summer of 1903?
86 A. The appeal to the Supreme Court of the United States?
Q. Yes sir.
A. No, the case was reversed or dismissed in the spring of 1901, my recollection is, and the appeal——
Q. You are just guessing, ain't you?
A. Yes sir.
Q. Well, I will refresh your memory.

A. Certainly.

Q. Don't you know that the petition for rehearing was set for hearing and heard on January 13th, 1903?

Q. That was——

Q. Set for hearing, and on the 14th day of January, 1903, the case was argued and submitted to the Supreme Court of Arizona?

A. Yes sir, that is right.

Q. And on March 20th, 1903, the case was dismissed?

A. Yes sir.

Q. Don't you remember that?

A. Yes, I was off just a couple of years.

Q. To refresh your memory, don't you know that the notice of appeal was given on May 23rd of the same year?

A. I was basing my recollection of the time from the time that you stated that your partnership began.

The COURT: I think Judge Street was on the Bench to February, 1902.

The WITNESS: This case was reversed by Judge Street,
87 and afterwards the motion for the rehearing was filed.

Mr. IVES: I would like to withdraw my admission that Street and Alexander were partners in 1901.

Q. Then the appeal in that case, the appeal was perfected——

A. The following fall after the dismissal.

Q. Upon August 12th?

A. Yes.

Q. 1903?

A. Yes sir.

Q. Did you ever have a talk with Judge Barnes, and when I say "Judge Barnes", I mean William Barnes, with reference to the perfecting of this case to the Supreme Court of the United States?

A. I did.

Q. With reference to who was to perfect the appeal and take care of the case?

A. He stated that Judge Street would attend to it. I think he was going on to New York at that time. I saw him along in the spring, and during the summer the appeal was perfected. He was leaving for New York shortly afterward.

Q. What did he say in reference to that?

A. He said Judge Street would attend to that, and take care of that, and for us to take care of it at the Bisbee end in furnishing the bond.

Q. The bond was sent down?

A. I received the bond from Judge Street and had it prop-
88 erly executed with the sureties, and returned it to Judge Street.

Q. Who was the Judge here?

A. I don't remember just the details here.

Q. Did Judge Doan approve the bond?

A. All those details, I don't know.

Q. Well now, Mr. O'Connell, what finally became of that case, the

"Triangle" case that was appealed to the Supreme Court of the United States?

A. The appeal was dismissed on the motion of the appellants.

Q. Under what arrangement, if any?

A. Under an agreement with Martin Costello, the appellee.

Q. Then there was a settlement of the matter, was there?

A. Well, there was an option taken on the——

Q. I asked you if there was a settlement of the litigation with Martin Costello?

A. Yes sir, there was.

Q. And not only was that case dismissed, the appeal dismissed in the Supreme Court of the United States, but also the other case, the "Standard" case?

A. The "Standard Quartz" case.

Q. You drew the arrangement, did you, the contract?

A. I did.

Q. And you had it recorded in the records of this county?

A. I did.

Q. And you recognized it, Mr. O'Connell?

A. Yes, that is it.

89 Q. I am showing you what purports to be Book 9 of Miscellaneous Records of Cochise County, Arizona at page 141. Now, scrutinize that, and see if that is the arrangement that was entered into at that time?

A. Yes sir.

Mr. ALEXANDER: We now wish to mark this for identification.

The COURT: Yes.

Q. And after this dismissal, after this contract that you testified about was entered into between Martin Costello and these appellants, the appellants, whoever they may be, concerning this "Standard Quartz" case and "Triangle" case, the litigation concerning that, what, if anything, if you know, was received by these defendants, Shattuck, Henniger and Marks?

A. They received seventy-five thousand dollars in full payment for their interest in the ground in controversy.

Q. And was any money, any of this seventy-five thousand dollars paid to Barnes and Martin and yourself?

A. All of it, one-fourth of it was paid.

Q. One-fourth of it?

A. To me.

Q. Amounting to how much?

A. $18,750.00.

Q. That was the portion that was arranged to be paid under the contract?

A. Yes sir.

90 Q. And of that you retained one-third?

A. I retained one-third, and paid over the balance to Barnes and Martin, part of it to Barnes and Colonel Martin, and the remainder to Mrs. Barnes.

Q. And when did you pay that to Mrs. Barnes?

A. I will give you the exact date. (Witness produces book from his pocket, and consults same.) On April 23rd, 1909 I honored her sight draft at Bisbee for $10,625.00.

Mr. Ives: For the record, I object to any payments made after the commencement of this suit, and after the filing of the complaint in this case.

The Court: It will go in subject to the objection.

Q. You say you paid him—April 23rd, 1909 you gave Mrs. Barnes ten thousand and how much?

A. Six hundred and twenty-five dollars.

Q. And did you pay anything to John Martin?

A. I did. On the 17th of June, 1905.

Q. What?

A. I did, on the 17th of June, 1905, I sent a draft to Colonel Martin of New York City for eighteen hundred and seventy-five dollars.

Q. Was that all that you ever paid him?

A. That is all.

Q. And how much did you retain?

A. Six thousand, two hundred and fifty-dollars.

Q. That made up the eighteen thousand?

Q. These three *paymens*, yourself, and Colonel Martin

91 A. Yes sir.

and Mrs. Barnes?

A. Yes sir.

Q. Mr. O'Connell, that was the money that was received on this contract, was it, that you have testified about, one-fourth of the proceeds realized from the litigation?

A. On the "Standard Quartz" claim.

Q. This arose on that contract?

A. Yes sir.

Q. That you have testified about?

A. Yes sir.

Q. Did Barnes and Martin have more than one contract conditioned for one-fourth?

A. No, just on the "Standard Quartz" claim.

Q. That was the only contract they had for a contingent fee of one-fourth; that Barnes and Martin had with Shattuck, Henniger and Marks?

A. Yes sir.

Q. That is, that is the only contract that Barnes and Martin had with these defendants with reference to a contingent one-fourth fee?

A. With these defendants.

Q. How long have you been attorney for Shattuck, Henniger and Marks prior to 1901?

A. That was the first employment I ever had.

Q. Since then you have been counsel?

92 A. Continuously, with the exception of Henniger. George Neal has been counsel for Henniger with the exception of this case.

Q. You have been the consulting attorney and legal adviser of Mr. Shattuck and Mr. Marks since that time?
A. Yes sir.
Q. From 1901 to the present time?
A. Yes sir.
Q. And when did you cease to be attorney and counsel and adviser for Mr. Henniger?
A. Well, this is the only employment I ever had for Mr. Henniger is this "Standard Quartz" claim.
Q. Well, you have been his counsel in this particular case?
A. Yes sir, as to this particular case; none other.
Q. As to the other defendants, you have been the general counsel?
A. Yes sir.
Q. All the time?
A. Yes sir.
Q. And you say you paid this money to Mrs. Barnes yourself?
A. I did.
Q. And in the making of this settlement with Mr. Costello under this contract?
A. Yes sir.
Q. You acted for these defendants on these particular matters?
A. In the settlement with Costello, yes sir.
93 Q. In fact, all the settlements here, you have acted as counsel?
A. Well, with the exception of the attorney fees.
Q. With that——
A. I acted for myself in the settlement of the attorneys' fees.
Q. They paid you the money?
A. They paid me the money on behalf of myself and Barnes and Martin.
Q. They paid you the money?
A. For myself and Barnes and Martin. Their understanding when they paid this money to me — that I was to receive half of it.
Q. When did they pay it to you?
A. Shattuck and Henniger paid me their portion of the first ten per cent, being the first payment on the property, in June, 1904.
Q. Yes?
A. The next payment was made the following year, I think, the following year, in June, 1905.
A. Yes?
A. And Shattuck and Henniger paid their pro rata again that year, Marks refusing to make any payment.
Q. When did they pay you?
A. I received it when the final payment—when they received their final payment in October, 1906. I think along about the
94 first of November, they paid me the remaining amount.
Q. When did they make the first payment to you?
A. The first payment?
Q. Yes?
A. In June, 1904.
Q. How much did they pay you?

A. (Witness refers to letter.) Six hundred and twenty-five dollars each.
Q. What?
A. Six hundred and twenty-five dollars each.
Q. The second payment?
A. Six hundred and twenty-five dollars each.
Q. When was that?
A. That was in June, 1905.
Q. And again?
A. The final payment in about the first of November, 1906.
Q. How much did they pay you then?
A. Well, the remainder of the eighteen thousand, seven hundred and fifty dollars.
Q. The balance that made that up?
A. Yes sir.
Q. What did you do with the money?
A. Out of the first payment, I transmitted, the first two payments I transmitted eighteen hundred and seventy-five dollars to Colonel Martin.
Q. Eighteen hundred dollars?
A. Eighteen hundred and seventy-five dollars.
95 Q. Out of the first two payments?
A. Out of the first two payments to Colonel Martin in New York.
Q. And when?
A. That was June 17th, 1905.
Q. What did you do with the other money?
A. The other money was held by me until April 23rd, 1909.
Q. Where was it held?
A. It was held by me in Bisbee.
Q. What place?
A. The Miners and Merchants Bank.
Q. In your name?
A. In my own name.
Q. Anything attached to that name?
A. Straight in my name?
A. To your own account?
A. Yes, sir.
Q. Well, what did you do with the money afterwards?
A. Six thousand, two hundred and fifty dollars I spent, and the remaining twelve thousand, five hundred dollars has been paid to Colonel Martin and Mrs. Barnes.
Q. What did you do with it after you got it in November, that ten thousand dollars you paid last April, what did you do with that?
A. After they paid it to me I deposited it to my account.
Q. Kept it there?
A. I kept it in the bank subject to my check.
96 Q. Tell anybody about it?
A. What is that?
Q. Tell anybody about it?

A. Yes sir, certainly.
Q. Who did you tell it to?
A. Colonel Martin and Judge Street and I think yourself; along about that time, it was generally known.
Q. It was turned over to you by these defendants to turn over, wasn't it, to Barnes and Martin their portion, and you deducted your part of it since that time.
A. It was turned over to me in settlement of the attorneys' fees.
Q. Wasn't it turned over to you, Mr. O'Connell, by these defendants for you—to pay your own portion of the fee, and turn over the balance to whom it belonged?
A. To Barnes and Martin.
Q. Yes, turn it over to Barnes and Martin?
A. They are the only ones that they recognized.
Q. That is what you said to Martin and Judge Street about it, didn't you?
A. I think so.
Q. And told me that?
A. I think so.
Q. That these defendants only recognized yourself and Barnes and Martin?
A. That is all.
Q. And that you had been notified by Mr. Hereford not to
97 pay it to any one else, and no one except yourself, is that right?
A. Certainly; when Judge Street wrote me in reference to the matter, I told him as far as I knew, I had no authority to pay any money to him; that there was no contract that I knew of between Street, or Street and Alexander or Barnes and Martin or Shattuck.
Q. Have you got a copy of that letter that you wrote to Street?
A. What is that date?

Mr. IVES: I don't want to be technical, may it please Your Honor, but they can't cross examine their own witness.
Mr. ALEXANDER: You are not representing him, are you?
Mr. IVES: No, but I am representing the plaintiff, and I am a party to the suit, and I object to this cross examination of his own witness.

The WITNESS: No, I haven't a copy of the letter here.
Q. Now, April——
A. I don't find a copy of the letter about me.

Mr. IVES: I object to any letter that he will introduce from the witness to Judge Street.
The COURT: You object on what ground?
Mr. IVES: On the ground that it can't bind us, the plaintiff herein.
98 Mr. ALEXANDER: You are out of this case, Mr. Ives.
Mr. IVES: He is not a defendant, he is not a party to this action. He is a witness called by the plaintiffs and defendants.
Mr. ALEXANDER: Well, the Court will take notice of the fact, and it is in the discretion of the Court.

The COURT: It will not bind you.
Mr. IVES: He is not a party, and he cannot be bound.

Q. Mr. O'Connell, I have reference to a letter dated October 9th, 1907?
A. October 9th?
Q. Have you got a copy of that?
A. No, I don't find the date. That is from Judge Street?
Q. Yes, to you?
A. Yes.
Q. Now, have you got the answer to that?
A. No, I haven't; I went through my files hurriedly, and I didn't find that copy.
Q. Look at this, Mr. O'Connell, do you recollect of ever receiving such a letter?
A. I received a number of letters, but I could not state whether that is one or not.
Q. Do you believe it was a letter of that purport?
A. I think I received the letter to which he refers, and I thought that I had brought all the letters which I had received.
Q. You received a letter from me, did you, yesterday or
99 day before?
A. I did, and I went through my files in search, and brought all I have with me.
Q. All that you could locate?
A. Yes.

Mr. IVES: In this connection, I think it will perhaps save time, I ask it technically with respect to the purpose of this testimony. Do you in this suit claim judgment against the defendants?
Mr. ALEXANDER: I think I will.

Q. And you offered then to pay over some of this money, did you, this ten thousand dollars, after you received it, to Barnes and Martin?
A. I did.
Q. To Mrs. Barnes, or to whom did you offer to pay it?
A. Why, I wrote letters to Colonel Martin and W. H. Daily who was representing Mrs. Barnes, offering to pay one-half of the fee.
Q. And they refused?
A. They refused to accept that.
Q. And since then you have paid two-thirds?
A. I have paid two-thirds.
Q. And that was in April last?
A. The final payment was in April.
Q. The ten thousand dollars?
A. Yes sir.
Q. And this money was given to you by these defendants
100 to settle the question of this retainer or contingent?
A. Yes sir.
Q. And to pay over to whom it belonged, Barnes and Martin and yourself?

A. It was paid to me with the understanding that I should retain one-half of it, and pay the other over to Barnes and Martin.

Q. You claim at one time that you claimed one-half?

A. Yes sir.

Q. You have testified that you were to get one-third of this in the arrangement?

A. That arrangement, and after the settlement I had a talk with Judge Barnes in Tucson, and he instructed me to proceed and secure settlement of one-fourth of the amount to be received, and that I could retain one-half of any amount that they would pay me, and acting on that representation they paid me the fee, with the understanding that I should retain one-half, and pay the other half to Barnes and Martin.

Q. And they refused to accept any arrangement like that?

A. Barnes and Martin refused to accept it.

Q. Mrs. Barnes?

A. Yes sir, Mrs. Barnes.

Q. And Colonel Martin?

A. Yes sir.

Q. In fact, he disputed that you were entitled to anything?

A. No, they only disputed that I should be entitled to
101 more that the amount they had agreed to originally.

Q. One-third?

A. Colonel Martin and Mrs. Barnes. Shattuck, Marks and Henniger disputed Barnes and Martin's right to receive anything.

Q. I asked you if Barnes and Martin did not dispute it?

A. No, you are suffering under a misapprehension.

Q. I think that is all, Mr. O'Connell.

Cross-examination by Mr. IVES:

Q. Mr. O'Connell, this appeal was dismissed as to the "Triangle" case upon the ground that the bond had not been filed within the time required by the statute of Arizona, wasn't it?

A. Yes sir.

Q. And the appeal to the Supreme Court of the United States was from that decision of the Supreme Court of the Territory only?

A. That was all.

Q. And the merits of the case were not involved in that appeal to the Supreme Court of the United States?

A. It was not.

Q. Did Henniger and Marks have any interest in the "Triangle" land?

A. They had no interest whatever.

Q. They had an interest only in the "Standard Quartz" case?

A. Yes sir.

Q. This seventy-five thousand dollars that was received, of
102 which the fee paid to you was one-fourth or eighteen thou-
said, seven hundred and fifty dollars was divided between Shattuck, Henniger and Marks was it not?

A. Yes sir.

Q. Was it divided between them in the proportion in which they owned in the "Standard Quartz"?

A. No, each one received one-third.

Q. Each one received one-third?

A. Yes sir, in the proportion in which they owned the interest in the "Standard Quartz"; I misunderstood you.

Q. Did either Judge Street or Mr. Alexander, or anybody representing them render any services whatever in the "Standard Quartz" case?

A. No; my recollection is that at the time that the "Standard Quartz" case was on appeal to the Supreme Court, that Judge Street announced that the case would be submitted on the printed briefs.

Q. Who prepared the briefs?

A. Judge Barnes; I submitted some authorities to him, and he was away, and on his return he dictated the brief, and had it printed.

Q. Who perfected the appeal in that case?

A. We was the appellees in that case, and there was just the one brief filed by Judge Barnes, and just the name- of Barnes and Martin appeared on the brief.

Q. When did you first hear that Street and Alexander claimed a part of this fee by arrangement with Barnes and Martin?

103 A. I think the first intimation I had was on the 5th of April.

Q. What year?

A. 1905.

Q. After Judge Barnes' death?

A. Yes sir.

Q. Do you know whether Shattuck or Henniger or Marks prior to that time knew that Street and Alexander, or either of them claimed anything under any contract with Barnes and Martin?

A. That is the first intimation. No, I believe February 7th was the first letter, and that is the first intimation, and I called their attention to the matter at that time.

Q. February 7th, 1905?

A. 1905.

Q. Now, by "they" you mean Shattuck, Henniger and Marks?

A. I mean Shattuck, Henniger and Marks.

Q. And prior to February 5th they had no knowledge of this agreement between Barnes and Martin and Street and Alexander?

A. Not to my recollection.

Q. Did Judge Barnes at any time mention to you that he had any contract with Street, or Street and Alexander to pay them for services in this matter?

A. The only statement that he made to me was that Judge Street would perfect the appeal of the "Triangle" case to the Supreme Court of the United States. When I discussed the merits of

104 the appeal with him, he stated that he was going to appeal, and I discussed the merits of the appeal with him, and he stated that Judge Street would perfect the appeal; he was going to appeal the case, and Judge Street would perfect the appeal.

Q. What was the expression of Judge Barnes with respect to his opinion as to the merits of the appeal to the Supreme Court of the United States?

Mr. ALEXANDER: We object to it as an opinion.

Mr. IVES: It tends to show whether there was any motive to pay one-third of this fee to them.

The COURT: The question may be answered.

Mr. ALEXANDER: It is immaterial in this case, and it is hearsay.

(Question read by the Reporter, as follows:

Q. "What was the expression of Judge Barnes with respect to his opinion as to the merits of the appeal to the Supreme Court of the United States"?)

A. Well, he did not state positively whether it had any merit or not, but he said that it would tie up the claim in litigation for at least three years, and in the meantime we might secure some sort of a settlement or compromise.

Q. Were you present at any of the conferences that *proceeded* the settlement with Costello?

A. I negotiated the settlement myself.

Q. In the settlement with Costello, was any amount paid or allowed by Costello by reason of the "Triangle" contention?

105 A. None whatever.

Q. By reason of the pendency of the "Triangle" appeal?

A. None whatever.

Q. What, if anything, did Costello or his attorneys say in these negotiations with respect to the "Triangle" appeal to the Supreme Court of the United States?

Mr. ALEXANDER: We object to this as immaterial and hearsay, incompetent, and immaterial what Costello said.

Mr. IVES: To show that they gave nothing for that.

Mr. CHRISTY: Let the written contract speak for itself.

The COURT: If the terms of the settlement were discussed.

Mr. IVES: I think it is clearly material if Costello in making this settlement paid absolutely no attention to this "Triangle" case. It is in evidence now that it concerned nothing but the construction of the Arizona statute by the Supreme Court of the United States, and I want to prove that Costello in making this settlement allowed nothing for this matter in which alone Judge Street rendered any service.

Q. Was it mentioned in the terms of settlement that the case in the Supreme Court of the United States should be dismissed?

A. Certainly.

106 Mr. ALEXANDER: We object to it as incompetent, irrelevant and immaterial, and it is not binding upon us what Costello may have said.

The COURT: I think you are right. In other words, as to what Costello may have said I don't think would be competent, because they don't always say what they mean, and they don't always tell the truth.

Q. Do you know what the contract — between Barnes and Martin and Shattuck with respect to the "Triangle" and the "Iron Prince" cases?

A. There was no contract.

Q. No contract?

A. No, straight fee.

Q. Did the contract——

Q. The understanding was that they would charge a straight fee, and I think the retainer was paid on the "Triangle" and "Iron Prince" cases.

Q. Yes?

A. And Marks and Henniger wished a contingent fee on the "Standard Quartz" case, and an agreement to that effect was reached.

Q. State whether or not the one-fourth contingent fee embraced any property other than the "Standard Quartz"?

A. It did not.

Q. State whether or not Judge Street, or Street and Alexander performed any services in any of this litigation other than that to which you have testified?

107 A. None whatever.

Redirect examination by Mr. ALEXANDER:

Q. Mr. O'Connell, Street appeared also in the case of Shattuck against Martin Costello in that "Standard" case?

A. No sir.

Q. He did not?

A. No sir.

Q. Were you there present?

A. I got there shortly after the matter was submitted.

Q. In the Supreme Court now?

A. In the Supreme Court; the calendar was called before I reached the court house, and I inquired about it, and Judge Street stated to me that the case had been submitted on the briefs.

Q. He was present and submitted it, didn't he?

A. He was present, and stated that he had a letter from Judge Barnes and Martin requesting——

Q. Were you present?

A. Requesting that the matter be submitted on briefs, and that they would not be over to argue it.

Q. Martin wasn't in the country?

A. Not at that time.

Q. And Judge Barnes was not here either?

A. My recollection is that Judge Street told me that he had a letter from somebody requesting that it be submitted without oral argument.

108 Q. You did not?

A. I went there to see that the case was attended to.

Q. You wasn't on the briefs?

A. I wasn't on the brief, but I was there to see that the case was attended to.

Q. It had been attended to?

A. It had been attended to the way I wanted it.
Q. You wasn't attorney in the case?
A. I was attorney in the case.
Q. Of record?
A. Not of record in the Supreme Court.
Q. You were going to go down there?
A. I was going to argue that case orally.
Q. But Barnes had requested——
A. He had requested Judge Street to have it submitted, and the appellant had seen fit to permit. I was prepared there to argue it orally if oral argument was to be had on it, but the case was submitted without oral argument, consequently I returned to Bisbee. I was going to attend to that case, and see that it was properly attended to on appeal.
Q. You didn't consider that Barnes was competent to try it?
A. I am not answering any such questions.
Q. Did you have any doubt about Barnes' ability to try it?

Mr. IVES: I object to that.
The COURT: Objection sustained.
109 Mr. ALEXANDER: That is all.
Mr. IVES: That is all.

Witness excused.

Mr. ALEXANDER: Mr. McDonald.

C. A. McDONALD, Being called as a witness on behalf of the Intervenors, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ALEXANDER:

Q. What is your name?
A. C. A. McDonald.

Mr. IVES: We will admit the paper without your proving it, Captain Alexander. I make no objections to the proof of the paper.
Mr. ALEXANDER: Well, maybe the defendants do.
Mr. O'CONNELL: The original document is lost, the one that was recorded.

Q. This is a county recorder's book?
A. Book 9 Miscellaneous Records.
Q. You are the County Recorder of this county?
A. I am.

Mr. ALEXANDER: I now introduce page 141 of Book 9 of Miscellaneous Records of Cochise County, Arizona.
The COURT: No objection; let it go in.
110 Mr. IVES: No objections.
Mr. ALEXANDER: Commencing at page 141 and concluding about the middle of page 145, and I will read it into the record and supply certified copy afterwards.

Said paper was read in evidence, and the same is in the words and figures following, to-wit:

"This Agreement, made the 22nd day of January, A. D. 1904, between Martin Costello and Mary Costello, His wife, of Tombstone, Arizona, parties of the first part, and L. C. Shattuck, H. R. Hanigar and Emil Marks, of Bisbee, Arizona, parties of the second part, Witnesseth:

That Whereas, there is now pending in the Supreme Court of the United States, and in the Supreme Court of the Territory of Arizona, two suits involving the rights of the parties hereto in and to certain lands in the Warren Mining District, Cochise County, Arizona, claimed by said Costello as the Roy and Leo Mining Claims, and by said Shattuck as the Triangle and Iron Prince Mining Claims, and by said Shattuck, Hanigar and Marks as the Standard Quartz mining claim,

And whereas, the said parties are desirous of settling the said suits, and making a sale of said property if possible.

Now, Therefore, said parties of the first part for and in consideration of the sum of one dollar to them in hand paid by said second parties, the receipt whereof is hereby acknowledged, hereby agree that in case said second parties sign stipulations to be filed
111 in said Courts for the dismissal of said suits, so that the final proof may be made by said Martin Costello in the U. S. Land Office at Tucson, and final Receiver's Receipt issued to him for said Roy and Leo mining claims as applied for patent by him, then and in the event said parties of the first part agree to grant, bargain, sell and convey to the second parties all their right, title and interest in and to the said Roy and Leo mining claims, for the sum of one hundred and sixty-nine thousand, one hundred and twelve ($169,112.00) dollars, payable as follows: Ten per cent (10%) thereof within ten days after written notice thereof, being given said second parties that final receiver's Receipt has been issued to said Costello for said Roy and Leo mining claims; ten per cent (10%) thereof within one year after the date of the first payment, and the balance within two and one-half years after the date of said first payment, in case patent be issued by the United States to the said Martin Costello for said Roy and Leo mining claims, but in case said patent shall not have been issued at that time, then said final payment to be made within ten dalys after written notice has been given said second parties of its receipt.

All of said payments to be made to the credit of Martin Costello at the Bank of Bisbee, Bisbee, Arizona.

The sipulations hereinbefore mentioned shall be for the dismissal of the appeal of L. C. Shattuck now pending in the Supreme Court of the United States in the case of L. C. Shattuck
112 against Martin Costello, and for the dismissal of the appeal now pending in the Supreme Court of the Territory of Arizona in the case of Emil Marks, H. R. Haniger, and L. C. Shattuck against Martin Costello.

And upon the return of said cases to the District Court of Cochise County that a judgment shall be entered therein for the defendant, Martin Costello for the relief asked for in his cross complaint, provided however, that each party shall pay their own costs in both cases.

And upon the signing of said stipulations for the dismissal of said suits as above set forth, parties of the first part agree to execute, acknowledge and deliver to said Bank of Bisbee in escrow a deed conveying all of their right, title and interest in and to said claims, or which may hereafter be acquired by them by reason of the issuance of patent by the United States for said Roy and Leo mining claims to the said Martin Costello to the said L. C. Shattuck, H. R. Haniger and Emil Marks with instructions to said bank to deliver said deed to said second parties or their assigns upon payment of the amounts at the time and in the manner hereinbefore set forth, and in case said payments are not made as herein mentioned, the said deed to be returned to said Martin Costello.

It is further understood and agreed that in case said first payment shall be made at the time mentioned, then said second
113 parties, or their assigns shall have the right to enter into, explore and develop said claims, provided, however, that all ore taken and removed from said claims shall be stored at some convenient place on or adjacent to said claims, and shall become the property of said second parties or their assigns if the payments are made as herein stipulated, otherwise to remain the property of said first parties.

And provided further that said second parties or their assigns may remove not more than two hundred tons of ore from said claims for assay and smelter tests.

And provided further that said Martin Costello, or his agent, may at all reasonable times visit the workings on said claims for the purpose of inspection.

It is further understood and agreed that in case said payments shall not be made as herein stipulated, and the deed to said Roy and Leo mining claims hereinbefore mentioned shall be returned to said Martin Costello, then said parties of the first part agree to execute, acknowledge and deliver to said second parties, a good and sufficient deed, conveying to said second parties six (6) acres in rectangular form along the north side line of said Leo mining claim adjacent to the Triangle, Iron Prince, and Copper Rock Mining Claims.

It is further understood and agreed that in case said second parties shall fail to sign the stipulations for the dismissal of said suits as herein set forth within thirty days from date hereof, then
114 this agreement shall be null and void, and said suits shall be continued the same as if this agreement had not been made.

In witness whereof, the said parties have hereunto set their hands the day and year first above written.

MARTIN COSTELLO.
MARY COSTELLO,
By MARTIN COSTELLO,
Her Attorney in Fact,
EMIL MARKS.
L. C. SHATTUCK.
H. R. HANIGER.

TERRITORY OF ARIZONA,
County of Cochise, ss:

Before me, Frank W. Goodbody, a notary public in and for the county of Cochise, territory of Arizona, on this day personally appeared Martin Costello, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 22nd day of January, A. D. 1904.

My commission expires April 1st, 1905.

FRANK W. GOODBODY,
Notary Public.

[SEAL.]

TERRITORY OF ARIZONA,
County of Cochise, ss:

Before me, Frank W. Goodbody, a notary public in and for the County of Cochise, Territory of Arizona, on this day per-
115 sonally appeared Martin Costello known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Mary Costello, and acknowledged to me that he subscribed the name of Mary Costello thereto as principal, and his own name as attorney in fact, for the purpose and consideration therein expressed.

Given under my hand and seal of office this 22nd day of January, A. D. 1904.

My commission expires April 1st, 1905.

FRANK W. GOODBODY,
Notary Public.

[SEAL.]

TERRITORY OF ARIZONA,
County of Cochise, ss:

Before me, J. M. O'Connell, a notary public in and for the County of Cochise, Territory of Arizona, on this day personally appeared L. C. Shattuck, Emil Marks, and H. R. Haniger, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 10th day of February, 1904.

My commission expires January 6th, 1908.

J. M. O'CONNELL,
Notary Public.

[SEAL.]

Filed and recorded at request of J. M. O'Connell, April 5th, A. D., 1904, at 9 A. M., in Book 9 of Miscellaneous Records, at pages 141, 142, 143, 144 and 145.

116 TERRITORY OF ARIZONA,
County of Cochise, ss:

I, C. A. McDonald, County Recorder in and for the county and territory aforesaid, do hereby certify that I have compared the annexed and foregoing copy with the Original Agreement between Martin Costello and Mary Costello, L. C. Shattuck, H. R. Haniger, and Emil Marks, filed for record in my office on the 5th day of April, A. D. 1904 at 9 A. M. and recorded in book 9 Miscellaneous Records at pages 141, 142, 143, 144 and 145, and that the same is a full, true and correct copy of said original, and of the whole thereof.

Given under my hand and official seal this, the 27th day of April, A. D. 1910.

[SEAL.] C. A. McDONALD,
County Recorder."

J. L. B. ALEXANDER, being called as a witness on behalf of the Intervenors, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. CHRISTY:

Q. State your name?
A. My name is Joseph L. B. Alexander.
Q. You are one of the plaintiffs herein?
A. I am not a plaintiff, but an intervenor.
Q. You knew Webster Street in his life time?
A. I did.
117 Q. And did you have any business relations with him?
A. He was my partner for some time in the latter part of the year 1902 until the first of September, 1907.
Q. And under the name and style of what?
A. Street and Alexander, practicing law, at Phœnix, Arizona.
Q. Did you know the defendant, Barnes and Martin?
A. I did.
Q. During the time you were with Mr. Street?
A. I did.
Q. Did you know Mr. Barnes of the firm?
A. I knew Judge Barnes, Judge William H. Barnes for many years; twenty-five years.
Q. Did you ever have any arrangement or your firm have an arrangement with the firm of Barnes and Martin relative to the litigation of Shattuck and Costello?
A. They did.
Q. What was it. Who was that arrangement made between and about when?
A. That arrangement was made between Judge William H. Barnes, the senior member of the firm of Barnes and Martin and myself and Judge Street at Phœnix, at our office there in the Fleming Block some time in the latter part of January, 1903.
Q. And——

A. Just prior to the meeting of the Supreme Court in January of that year.

Q. And what was said by Mr. Barnes at that time, and
118 by yourself.

A. Well,——

Q. Relative to the conduct of this litigation between Shattuck and Costello?

A. The matter was first called to my attention by Judge Street. That is, that there was litigation pending in the Supreme Court of Arizona, wherein these defendants, Shattuck, Marks and Haniger and Costello were parties, being an appeal taken from this court, this district, to the Supreme Court of Arizona by Judge Barnes representing these defendants as appellants, in one of these cases, and Judge Barnes was in——

Mr. IVES One moment, I object to this testimony on the ground that the witness cannot testify in his own behalf as to conversations between himself and a deceased person against the estate of a deceased person.

Mr. CHRISTY: There is no testimony here against the estate of a deceased person. Mrs. Barnes is sued in her own right according to the complaint and the avowel of counsel as legatee, devisee and assignee of the firm of Barnes and Martin. The only estate involved in this suit is the estate of Mr. Street, Webster Street, Mary Street as widow, and she does not make this objection, and she is the only one that can.

Mr. IVES: May it please your Honor, with respect to Mrs. Barnes suing this assignee, it seems to me there can be nothing in it. If Mr. Martin owed these intervenors, they can sue him. Now,
119 I believe, as a matter of law no judgment in this case can be rendered against Mrs. Barnes, and if Your Honor should take the view as he intimated this morning, that Mrs. Barnes being a residuary legatee after destribution, can be sued, then I will revoke the statute, and ask that the witness be not permitted to testify. If Your Honor lets this testimony come in, they can't recover against Mrs. Barnes, because she made no contract to give them anything, so I want to make my objection in order that there may be no doubt as to my position in the matter.

Mr. CHRISTY: The statute is not applicable to this case. I have abundent- of authorities here that the statute does not apply to this suit, because she is not being sued as administratrix or representative of an estate where a judgment cannot be rendered against her, but in as much as the complaint shows that she is being sued in her own right, as counsel have avowed, hence the statute has no application, and I have one authority here from Texas and other places.

Mr. IVES: I shall hereafter argue, if Your Honor rules with them, that they are estopped from a personal judgment against Mrs. Barnes in this case.

The COURT: She is sued in her own name as residuary legatee of the estate of William H. Barnes, and as the assignee of Martin?

Mr. IVES: Yes.

120 The COURT: She is not sued as the executrix or administrator of the estate. The testimony of this witness is as to the contract made by Barnes and Martin and Street.

Mr. IVES: And the plaintiff.

The WITNESS: And the intervenors.

Mr. CHRISTY: Our statute comes from Texas, and Texas has construed this over and over again, and I can cite you shortly to one case, but there are a number of others, but I can't give you reference to the latter, just now. In the case in the 46 Southwestern, 582, it is held that a widow sued in her own right does not come within the exception of the rule. There is also in the 14th Southwestern, 157, which is the 77 Texas at 508; the 30 Southwestern at 360; the 97 Southwestern at 117; the 150 Federal at 720. The 150 Federal being based upon the federal statute, holding that every person is a competent witness except those that are named in the statute. That because the statute does not name a legatee, a legatee does not come within the statute where a suit is not against a legatee, because the statute does not name a devisee, therefore the statute does not cover that, where the devisee is a party, and the testimony is admissible, and the fact that it does not cover a widow sued in her own right. That is the decision of the Supreme Court of Texas.

Argument of Counsel.

121 The COURT: We haven't the authorities here, and we will have to pass this over, or we will let the testimony in subject to the objection.

Mr. CHRISTY: If Mrs. Barnes received this property as a legatee. she paid nothing for it, and she would have to take it with the burden that was on it, and therefore she is not an innocent purchaser, and therefore she is covered by this rule.

Mr. IVES: Let it be received subject to the objection.

The COURT: Yes, I will rule upon it after I have examined the cases.

Q. What conversation did you have with Mr. Barnes relative to——

Mr. IVES: I want to renew my objection to this question. It is supposed that I have made them.

A. As I have stated before, the first time that I was aware of this litigation of which has been testified to here, was when Judge Street, my partner, called my attention to it in my office in Phœnix, in the presence of Judge Barnes who was then there in the office at that time endeavoring to get Judge Street and myself to look after this "Triangle" appeal case. Judge Barnes at that time was making arrangements to return to New York, as he stated. This case had been appealed by him from this court, and the Supreme Court, upon appeal, reversed the case. However, before the remittitur was issued by the clerk of the court, remanding the case to this court from the

122 Supreme Court, the appellees filed a motion for a rehearing. Subsequently they had filed another motion, an amended motion for a rehearing by additional counsel. Judge Riley being the first counsel, and Mr. Morgan in the appeal on the filing of the

first motion. Colonel William Herring joining Judge Riley in the second amended motion for a rehearing. The question arising on this discussion with Judge Barnes, myself and Judge Street was as to the grounds of this motion for rehearing, this amended motion, which indicated that the question of jurisdiction had been raised by this petition of rehearing, and we discussed that branch of the case, and I myself, advanced some views upon it, and Judge Barnes was doubtful about it, and finally Judge Barnes made this expression: "now, I want you to attend to this case; I have to go back to New York. Now, if you will attend to this case; if you will agree to attend to this case, I will give you one-third of the fee which I have coming to me on a contingent fee from Shattuck, Heniger and Marks, Mr. O'Connell, who is associated with me, is entitled to the other third." We discussed that matter back and forth with him, and finally Judge Street and I agreed to take the case and attend to it. We were to argue the case on the petition for rehearing, and if we were defeated, we were to perfect the case, the appeal to the Supreme Court of the United States. We did argue it, Judge Street did personally argue this case before the Supreme Court, before Your
123 Honor, sitting on the Bench in Phœnix. The case was submitted there, and afterwards the Court found that we had no jurisdiction for the reason that the appeal bond had not been filed in time, and dismissed the case from further consideration. Then Judge Street and I prepared the petition for the Supreme Court of the United States, and we presented that and got the allowance, and afterwards we prepared an assignment of errors, statement of facts, prepared the bond, prepared the citation and had them all properly arranged and filed in the Court, obtained a transcript of the record and had it transmitted to the Supreme Court of the United States.

Q. Did you have any other or further conversation than what you have related at that time with Judge Barnes?

A. With Judge Barnes?

Q. With Judge Barnes?

A. We had quite a lot of conferences; in fact, we had another case we took for him, the case of Lindsley against somebody, which was finally defeated in the Supreme Court of the United States. This matter was in reference to a fee which the defendants—a contingent fee which the defendants—that these defendants Shattuck, Heniger and Marks.

Q. Did he say what that contingent fee was?

A. Yes, he said one-fourth of whatever was realized from the prosecution of these cases that he had. He didn't say what the case was. I understood it, and I understood it at the time that it was the whole matter. I didn't know what it was, which
124 case it was. He said that they had this contingent fee coming from Mr. Heniger, Shattuck and Marks and that we should get one-third of that if we cared to take up and perfect the appeal, and argue the case before the Supreme Court, the motion for the rehearing, and perfect the appeal in the "Triangle" case, and we agreed to do it, accepted his offer and did the work.

Q. Did he have anything to say about the merits of the case?
A. Oh yes, we talked about the merits of the case did not enter tht matter; it was in regard to taking the appeal. The whole litigation was upon this: This appellees were anxious to get the title to it, get the patent, and this proceeding was a adverse and a delay to getting the patent, and Judge Barnes wanted to hold this matter and force a compromise from them, if not come to realize that they would lose it in the Supreme Court of the United States.
Q. Was there anything further—does anything further occur to you Mr. Alexander?
A. Sir?
Q. Does anything further occur to you that you would like to state about your relations?
A. Well, after this matter was appealed, and the next thing we heard; that is, Judge Barnes came to our town when he returned from the east some time in the year 1904, and advised us that a settlement was about to be effected; something was going on towards a settlement of it, and about that time he died. After
125 that we communicated with Mr. O'Connell, and notified him—Judge Street notified him—Judge Street was doing the writing. He was a warm personal friend of Judge Barnes, and was doing the writing about the case. He sent a notice to Mr. O'Connell about the right of our fee in it. I also had a talk with Mr. O'Connell afterwards in Bisbee, and went over the case thoroughly with him, and he then advised—he told me that he had some trouble with Mr. Martin——

Mr. IVES: I object to that.

A. In reference to his fee.

Mr. IVES: I object to that.

The WITNESS: He also told me that the money——

Mr. IVES: I object to that.
The WITNESS: Object to what?
Mr. IVES: To that statement or anything that occurred between Mr. O'Connell and yourself after the death of Mr. Barnes as binding Mrs. Barnes, as Mr. O'Connell is not a party.

Q. Did you ever send any notice to Mr. O'Connell?
A. Oh yes.

Mr. IVES: I object to that as immaterial.

Examination by Mr. HAYES:

Q. Do you know whether or not any notice had been sent to Mr. O'Connell by yourself or your firm relative to the fee you claim as a result of this settlement?

126 Mr. IVES: I object to that as immaterial. Mr. O'Connell is not a party.
Q. You may answer it "yes" or "no".

The COURT: I do.

A. I do.

Q. Do you remember such notice?

A. I dictated the notice and Judge Street signed it and sent it. I dictated it.

Q. I will ask you to examine that, and state whether or not it is the notice you dictated?

A. This is a copy of it.

Q. Do you know whether or not the original, of which this is a copy was transmitted; placed in the United States mails for transmission to Mr. O'Connell.

A. Yes, and Mr. O'Connell told me he had received it.

Q. He told you he had received it?

A. Yes sir.

Q. And this is a copy of the notice?

A. Yes sir.

Mr. HAYES: We offer that in evidence. We also have a letter saying that he got it.

Mr. IVES: I object to this; O'Connell is not a party to this suit?

Mr. O'CONNELL: I object on the part of Shattuck, Marks and Haniger to the introduction of this on account of it being irrelevant and immaterial, and not binding on them.

Mr. HAYES: Even though it is true.

127 The COURT: I will let the question be answered. As stated by counsel, it does not bind Barnes and Martin or Mrs. Barnes as it stands, but it is a step in establishing a fact, and I can inquire of Mr. O'Connell whether he notified Barnes or Barnes and Martin of the receipt of this demand from Street and Alexander in order to know whether notice went to them, or any of them, and for that purpose only as laying the foundation for that testimony is the only reason it will be admitted. It can go in just as well when Mr. O'Connell is put on the stand.

Said letter was marked Exhibit 1 and was read in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT 1.

"Webster Street. J. L. B. Alexander.

Law Office of Street & Alexander, 302-303 Fleming Bldg.

PHOENIX, ARIZONA, *October* 9, 1907.

J. M. O'Connell, Esq., Bisbee, Arizona.

SIR: Some time in the year 1900 or thereabouts, a certain case was brought in the District Court of Cochise County at Tombstone, wherein one Martin Costello was plaintiff and L. C. Shattuck, Marks and Haniger were defendants, which suit involved the title to the Triangle and Standard Quartz mining claims in said county.

128 At the time Mr. Shattuck employed the law firm of Barnes and Martin of Tucson to represent him, Marks and Hanninger in said case, and agreed with Judge William H. Barnes, the

senior member of said law firm to pay said law firm a contingent fee of one-fourth of whatever said defendants might recover in said action, it also appears that afterwards Judge Barnes secured your services to assist him in said case, and agreed to give you one-third of said contingent fee.

This case was afterwards tried in Cochise County and a judgment was rendered in favor of Costello against said defendants in respect to the Triangle claim, and a judgment was rendered in favor of defendants in respect of the Standard Quartz claim. An appeal was taken by Judge Barnes in the case decided against Shattuck, and an appeal was taken by Costello in the case decided against him. This appeal Judge Barnes brought to the Supreme Court of Arizona, and employed the firm of Street and Alexander to assist him in said appeal before the Supreme Court, and agreed to pay said law firm of Street and Alexander, one-third of the said contingent fee agreed to be paid him by said defendants. Afterwards the case was argued before the Supreme Court by the firm of Street and Alexander, but it having appeared in the argument of said case that the appeal bond had not been filed in time, the appeal was dismissed, and subsequently, at the request of Judge Barnes the firm of Street and Alexander perfected an appeal from the Supreme Court of Arizona
129 to the Supreme Court of the United States in said case, and while said appeal was pending in the Supreme Court of the United States the litigation was settled between the plaintiff and defendants in said case, whereby it appears the sum of $75,000 was agreed to be paid by the plaintiff to the defendants; whereupon the appeal taken to the Supreme Court of the United States by the defendants was dismissed and also the appeal taken by the plaintiff to the Supreme Court of Arizona was also dismissed; and it also appears that since that time the said sum of $75,000 has been paid by the said plaintiff to the said defendants in said case, the last payment thereof having been made on Octover last, and that the said defendants, Shattuck, Marks and Hanninger have paid one-fourth of said amount, or $18,750 to yourself, as the fee agreed to be paid to the firm of Barnes & Martin, to be by you paid to the attorneys in the case entitled thereto, and that you have retained of said fee, as your part thereof, $6250, and have paid to John H. Martin, the junior member of the firm of Barnes and Martin, the sum of $1875, and that you now have in your possession of said fee, $10,625.

We hereby notify you that we claim one-third of the said contingent fee paid you of $18,750, to-wit: $6250 as our part of the said fee as agreed to be paid to us by William H. Barnes, the senior member of the law firm of Barnes and Martin, for our services in
130 the case; and we hereby now demand of you that you pay us said sum of $6250, and that you pay the same to no one else; otherwise, we shall hold you responsible to us for said sum, to-wit: $6250. Please acknowledge receipt.

Yours truly,

WEBSTER STREET,
J. L. B. ALEXANDER,
Composing the Firm of Street and Alexander.

A/F.

Q. Was any further steps taken by you, Mr. Alexander, or by Judge Street or by the firm towards asserting or maintaining your interest in this fee, other than you have detailed?

A. Why, this is not the only letter that was written to Mr. O'Connell about it; other letters were sent to him, copies of which are there, prior to that time. Other than that, I went to Bisbee to see Mr. O'Connell about it and had a personal talk with him, looked through the memorandum of his correspondence with other parties in regard to the matters of Colonel Martin and Mrs. Barnes, or something like that, and afterwards we brought an action here in intervention to assert our rights in this action.

Cross-examination by Mr. IVES:

Q. Captain, with respect to this first conversation between Judge Barnes and Judge Street and yourself; that was in the fore part of January, 1903?

A. Yes sir.

131 Q. And at your office in Phœnix?

A. Yes sir.

Q. You are quite clear of that?

A. There is no question about it.

Q. Your second conversation between Judge Barnes and yourself, was that also in Phœnix?

A. That was in Phœnix, after his return from the east a short time before his death.

Q. A short time before his death? In what month?

A. I forget what month it was. As soon as he came back from the east, he came over to Phœnix, and we had a talk with him, and he remarked it was about to be settled; he advised something was on foot to settle the matter.

Q. Did you see this correspondence with Judge Barnes on business matters, as the partner of Judge Street?

A. I have.

Q. I will ask you if you ever read a letter from Judge Barnes to Judge Street dated January 26, 1903?

A. I don't know. I will tell you Mr. Ives, I have a copy book in the office in which wherever I write I put all my letters in the copy book. Judge Street had a custom of putting all his letters in duplicate, and saving one and putting it in his desk and sending the other out.

Mr. IVES: If the original is not here, I will offer a copy of a letter from Judge Barnes to Judge Street.

Said letter was marked "Exhibit A" and was now read by
132 the counsel, and the same is in the words and figures as follows:

EXHIBIT A.

JANUARY 26, 1903.

Hon. Webster Street, Phœnix, Arizona.

My DEAR JUDGE: I received your letter and have considered it well. I think that you are right about it; that the Board intend to compel the Court to take the full responsibility, and I think the Court, on the other hand, do not wish to do it until they have to. I think, when they do have to, there will be no doubt about the result. I am to have an interview with Judge Dillon tomorrow on the question whether we shall not get out contempt proceedings in the Supreme Court of the United States against everybody out there. That we will consider, but I think that your plan is the wisest. Confidentially, the President and Attorney General were both interviewed yesterday, and I think that the appointees out there will hear something drop from Washington. The expression was made that it was an unheard of proposition to give a Board sixty days to obey a mandate, and I am sure that is the view of the Attorney General, and that they think that the Court and Board are, all of them, 'monkeying' with the decision of the Supreme Court. This is for you or me alone. We want, however, to get in action as quickly as we can,
because if we wait until after Statehood, the bonds will not
133 be worth so much as they would if issued now. While I do
not think, and it is not generally believed here, that Quay will succeed to pass his bill, yet he may do so, and if he does and we not have the bonds, will make trouble as to the value of the bonds when they shall be issued.

With reference to the Tombstone case, I think you are very fortunate in the situation, and we will get their evidence in good shape when I come out there.

I find the case of Swan v. Hill, 155 U. S., 394, practically holds that, where a bond is defective, if a motion is made to file a good bond, it will be allowed. That means that it has not jurisdiction of the subject matter, but has jurisdiction of the person, which may be waived by the parties themselves. Again, it does seem to me that the stipulation by which the parties were to have all their rights of appeal preserved, even though the Court decided on vacation, includes the right to file a bond and waive the question of time. I remember, so does Mr. Martin, that he prepared the bond and got it signed as quickly as he could, and I think that Reilly's stipulation waived all questions of time, and that we finally filed the bond within a reasonable time under that stipulation, which is all that could be required, and that that stipulation is a complete waiver of the bond which was filed in a reasonable time thereafter. I make these suggestions to you, but I have no doubt that you have thought of stronger reasons than these.

134 Thanking you for your kindness in all these matters and remember that I shall find a way to reimburse you therefor.

We found the girls well. We were with them both yesterday and the day before. Willi- seems to be apparently perfectly

well. Mrs. Barnes is getting along nicely, but she does not dare to go out in the cold, chilly air now. It has been snowing for a day or two and it is thawing today, and the cold here makes her throat sore.

Again thanking you, I am,
Very truly, your friend."

——— ———.

Q. Now, Captain, in this conversation with Judge Barnes, nothing was said about the "Standard Quartz" case?

A. Well, I don't know anything than as to the designation between the "Standard Quartz" case and the "Triangle." All the case we were looking after at the time was the "Triangle" case, which was reversed?

Q. It had been reversed before this conversation?

A. Yes sir.

Mr. CHRISTY: I interpose an objection to that letter. I want to interpose the formal objection that the letter is a self-serving declaration.

The WITNESS: We attended to the case of Lindsley and we also attended to other cases. There is a number on the desk there in which Judge Street appeared for him, and Judge Barnes so says in the brief.

Q. You have testified to all of the services rendered by
135 you in any of these matters?

A. I have, except as I said.

Q. I mean in this matter, the subject matter of this controversy?

A. Oh yes, that is all.

Q. Now, your firm did some service in the matter of the Pima County bond case?

A. That was another matter.

Q. It is referred to in that letter?

A. That is on another matter entirely.

Q. In that case, Judge Barnes gave Judge Street five thousand dollars worth of bonds?

A. I don't know anything about that.

Q. Do you know whether the bonds were given to Judge Street?

A. I don't know; I never heard; if he did, I never heard of it. I know I haven't any of them; I have never seen or heard of them.

Q. Well, Captain Alexander, you kept books for your firm?

A. Yes sir.

Q. Did you keep any entry in respect to this matter?

A. I made an entry in this case and in the Lindsley case when we got through perfecting this appeal.

Q. At or about the time of this employment did you make any entry?

A. I made an entry in July following the employment.

Q. July?

A. At the time of making out the assignment of facts.

136 Q. Made the entry in July, 1903?
A. Yes sir.
Q. Have you the book here?
A. No, I haven't; I didn't carry any amount; I just put it in there "Shattuck case."
Q. Did you make any entry in respect to this employment and the terms of it?
A. No sir, I put in there the "Shattuck case" and the "Lindsley case" without putting any amounts at all; just a memorandum.
Q. In your various employment entries with respect to various employments with firms, is that your custom?
A. This was not like an ordinary case. I thought Judge Barnes was a warm personal friend of Judge Street.
Q. And in other matters, it is your custom to make the entries in some book?
A. Yes, when it is a straight fee, if a person employed me.
Q. If you have an agreement to get a contingent fee, do you about the time make such an entry in the books?
A. If I did, I would put them in it.
Q. That is your custom?
A. That is my personal custom. I follow it now most of the time except in friendship cases, and I let the other counsel. In this matter, we let Judge Barnes to run it.
Q. Do you know whether or not your firm, after the receipt of this letter of January 26th, 1903, which is in evidence, write to
137 Judge Barnes referring to his statement that he would try to find some way to reimburse you, calling his attention to that?
A. I never saw this letter that you have just read. It seems to be a personal letter. I don't know whether he answered it or not. Very likely he did, he was in correspondence with Judge Barnes.
Q. Did Judge Barnes ever address a letter to the firm of Street and Alexander?
A. I don't know, if he did, Judge Street got it. I think his correspondence, so far as I know, was directed to Judge Street.
Q. And the same with Colonel Martin?
A. Yes, he addressed Colonel Martin, not Barnes and Martin, Judge Street and Colonel Martin. Judge Barnes and Judge Street; Judge Street and Judge Barnes. We had a few warm personal friends. The same way with Mrs. Barnes. He kept his personal correspondence with her, although they all pertained to the firm business.
Q. That is all.

Redirect examination by Mr. HAYES:

Q. Had you, if you recall, prior to the death of Judge Barnes, any notice of the final settlement of the case appealed to the Supreme Court of the United States?
A. I know only what Judge Barnes told us, that this case was in the course of settlement, or some advances from some parties or other

to settle the matter, and he said "I think it will be settled
138 soon," and shortly after that he died.

Recross-examination by Mr. IVES:

Q. Did you or Judge Street file any claim against the estate of Judge Barnes?

A. Certainly we did not. We did not consider that the estate of Barnes owed us anything. I considered that we had an interest in this claim.

Redirect examination by Mr. HAYES:

Q. I understand you then, that prior to the death of Judge Barnes you had had no notice that this controversy was actually settled?

A. No, I didn't know it at all until after Judge Barnes died. The first time I heard it, I heard it from the outside, and we immediately got in correspondence with Mr. O'Connell about it.

Q. Please state what that is?

A. This is the petition of intervention, which was signed by Judge Street, and swore to by himself. He drew it and signed it and swore to it.

Q. I will ask you what that is, Mr. Alexander?

A. This is a certified copy of the will of William H. Barnes, probated in the County of Pima.

Mr. HAYES: We offer it in evidence.

Mr. IVES: We admit all those facts.

Mr. HAYES: We will offer it in evidence.

Said paper was marked "Exhibit B" and was now read in
139 evidence, and the same is in the words and figures, following, to-wit:

EXHIBIT B.

"FEBRUARY 21", 1902.

I make this my last will.

I give, bequeath and devise to my wife, Belle J. Barnes, if she survive me, all my property of every kind and character. If she do not survive me *me*, then I give, bequeath and devise all my property to Miss Willie B. Martin, Miss Madge Martin and Master James K. Martin, children of John H. Martin, and Jose Belle Martin, all my property to be divided equally between them. If my wife survive me, she shall be the executrix of my will without bond. If not, then said John H. & Jose B. Martin shall be executors hereof without bond & with full power to sell or dispose of any property of which I may die seized as they may see proper. I make this with my own hand and declare the same.

WILLIAM HENRY BARNES.

Endorsements.

In the Probate Court of the County of Pima, Territory of Arizona. In the matter of the estate of William H. Barnes deceased. Last

Will and Testament. Filed in the Probate Court of Pima County, Arizona Ter. November 17, 1904. W. J. Kirkpatrick, Ex Officio Clerk, by —— ——, Deputy. Recorded Record of Wills No. 3 Pg. 141.

140 In the Probate Court of the County of Pima, Territory of Arizona.

In the Matter of the Estate of WILLIAM H. BARNES, Deceased.

Certificate.

I, William F. Cooper, Judge and Ex Officio Clerk of the Probate Court in and for the County of Pima, Territory of Arizona, do hereby certify that the foregoing is a full, true and correct copy of the original Will of William H. Barnes, deceased in the matter of the estate of William H. Barnes, deceased, as the same remains of record and on file in the office of said Clerk. I further certify the same has not been revoked.

Witness my hand and the seal of my office this 6th day of January, A. D. 1910.

[SEAL.] WILLIAM F. COOPER,
Judge and Ex-Officio Clerk of the Probate Court."

Q. And what is that?

A. That is a certified copy of the decree of distribution made in the Probate Court of Pima County.

Mr. HAYES: We will offer that in evidence.

Mr. IVES: No objection.

Said paper was marked "Exhibit C," and was now offered in evidence, and the same is in the words and figures, to-wit:

141 EXHIBIT C.

"In the Probate Court of the County of Pima, Territory of Arizona.

In the Matter of the Estate of WILLIAM H. BARNES, Deceased.

M. P. Freeman, administrator with the will annexed of the estate of William H. Barnes, deceased, having on the 9th day of April, 1906, filed in this court his petition praying for an order finally distributing said estate to Belle J. Barnes, widow of the said William H. Barnes, deceased, being the sole heir, legatee and devisee *and devisee* under the will of said deceased, which said will had been heretofore duly probated before this court and said Belle J. Barnes having also on the 9th day of April, 1906, filed her petition praying for an order finally distributing said estate, and praying that the petition of said administrator be granted, without any further notice, and that this court do forthwith distribute all of the estate of said

decedent now in the hands of said administrator as well as all property of decedent not included in the inventory on file herein, to her, the said Belle J. Barnes, sole heir and legatee; and the said petition coming on regularly to be heard this 10th day of April, 1906, the said administrator appearing by Selim M. Franklin, Esq., his
142 attorney, and Belle J. Barnes, sole heir and legatee appearing in her own proper person, the court proceeded to the hearing of said petition, and it appearing to the Court that the property of said estate is now ready for distribution, and that said estate is now in condition to be closed:

That the said William H. Barnes died testate in the City of Tucson, County of Pima, Territory of Arizona, on the 10th day of November, 1904, leaving a will which was duly probated by this Court on the 18th day of November, 1904; that under and by virtue of said will, said Belle J. Barnes, widow of said decedent is his sole heir and legatee.

That M. P. Freeman, administrator with the will annexed of the estate of said decedent, has heretofore filed his final account, which thereafter, and on the 7th day of March, 1906, was duly allowed and approved; that since the allowance of said account, said administrator has expended as necessary expenses of administration the sum of $43.30, being the fees of this Court and the Clerk thereof; that the said administrator has paid all of the debts of said estate as allowed by this Court and has delivered to L. C. Hughes one thousand shares of the capital stock of the Cieneguita Copper Company, as heretofore ordered by this Court; that said administrator has received no compensation for his services as such administrator, and that the sum of $2500.00 is a reasonable fee for his said services, being less than one-half the commission as allowed by law.

That said Belle J. Barnes has assigned to J. C. Campbell
143 one thousand shares of the capital stock of the Cieneguita Copper Company, and that the distribution to her of said shares of stock should be made subject to such assignment, or the one thousand shares aforesaid should be distributed to said J. C. Campbell as assignee.

Now Therefore, it is hereby ordered, adjudged and decreed that all of the property of the estate of said William H. Barnes, deceased, real, personal and mixed, and now remaining in the hands of said administrator, and any and all other property not now known or distributed which, may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed to Belle J. Barnes, the sole heir, legatee and devisee of the said William H. Barnes, deceased, excepting, however, one thousand shares of the fifty thousand shares of the capital stock of the Cieneguita Copper Company, mentioned and described in the inventory herein, which said one thousand shares of the stock of the Cieneguita Copper Company is herewith distributed to J. C. Campbell of San Francisco, in the State of California, under and in pursuance of a certain agreement made between said J. C. Campbell, and said Belle J. Barnes, a copy of which is annexed to the final report of M. P. Freeman, administrator, and which is now on file herein.

It is further ordered, adjudged and decreed that the said M. P. Freeman, administrator as aforesaid shall forthwith transfer and deliver to said Belle J. Barnes all property, real and personal which is now in his hands, as such administrator, or which has
144 come into his possession, or under his control by virtue of his being the administrator of said estate, and shall deliver unto her, the said Belle J. Barnes all certificates for shares of stock in corporations which have come into his possession by virtue of his being administrator of said estate.

And it is further ordered that the accruing costs of administration as aforesaid be paid out of any moneys in the hands of said administrator before making final distribution thereof.

It is further ordered that as the said M. P. Freeman has filed in this Court his written waiver of the fees and compensation to which he is entitled as such administrator, that said compensation be deemed and considered as paid.

It is further ordered that upon the said M. P. Freeman, filing the receipt of said Belle J. Barnes, for the property distributed as aforesaid he be discharged from his trust as administrator; that his bondsmen be released and discharged, and that said estate be closed.

Done in open Court this 10th day of April, 1906.

W. J. KIRKPATRICK,
Probate Judge.

Endorsements: In the Probate Court, Pima County, Arizona. In the Matter of the Estate of William H. Barnes, Deceased. Decree of Distribution. Filed April 10-1906. W. J. Kirkpatrick, Ex-Officio Clerk Probate Court. Recorded Journal No. 10, page- No. 52-53.

145 In the Probate Court of the County of Pima, Territory of Arizona.

In the Matter of the Estate of WILLIAM H. BARNES, Deceased.

Certificate.

I, William F. Cooper, Judge and Ex-Officio Clerk of the Probate Court in and for the County of Pima, Territory of Arizona, do hereby certify that the foregoing is a full, true and correct copy of the original Decree of Final Distribution in the matter of the estate of William H. Barnes, deceased, as the same remains of record and on file in the office of said Clerk. I further certify that the same has not been revoked.

Witness my hand and the seal of my office this 6th day of January, A. D., 1910.

[SEAL.] WILLIAM F. COOPER,
Judge and Ex-Officio Clerk of the Probate Court."

J. M. O'CONNELL, Being called to the witness stand by the Court on its own motion, and said witness having been heretofore duly sworn according to law, testified as follows:

Examination by the COURT:

Q. Mr. O'Connell, in regard to this letter of October 1907 asking for their one-third of that eighteen thousand dollar-, did you advise or notify Barnes and Martin, or Colonel Martin or Judge
146 Barnes of this notification from them on their part?

A. Why, I have no distinct recollection of that particular notice, that is, that particular notice, but I received notice at some time, but there was considerable correspondence back and forth, and I knew that Mrs. Barnes and Colonel Martin were both advised of Judge Street's claim.

Q. About what time, do you know?

A. Some time in 1905.

Q. Yes?

A. Somewheres in 1905.

Q. That is all.

Witness excused.

Mr. HAYES: Now, if the Court please, we desire to offer in evidence a letter dated June 20th, Tombstone, Arizona, June 20th, 1903 on Fletcher M. Doan's letter head, and filed with the appeal bond in the case of Shattuck against Costello showing that the appeal bond had been approved, and addressed to Hon. Webster Street of Phœnix, Arizona.

Mr. IVES: No objection to it.

The COURT: No objection; let it go in.

Said letter was now marked "Exhibit D" and introduced in evidence, and the same is in the words and figures following, to-wit:

147 EXHIBIT D.

"Fletcher M. Doan, Associate Justice Supreme Court, Judge Second Judicial District, Arizona Territory.

DEPARTMENT OF JUSTICE,
TOMBSTONE, ARIZONA, *June 20th*, 1903.

Hon. Webster Street, Phœnix, Arizona.

DEAR JUDGE: Please find enclosed bond in the case of Shattuck against Costello duly approved as requested. The Clerk forwarded the papers in last night's mail to the Clerk of the Supreme Court. I am quite busily engaged in Court here at this time.

Yours very truly,

FLETCHER M. DOAN, *Judge.*

(1 encl.)"

Mr. ALEXANDER: That is our case.

And the Plaintiff- here rested their case.

Mr. O'CONNELL: At this time, we move *the* dismiss the case against the defendants, Shattuck, Marks and Hanniger, because there has been absolutely no testimony connecting these defendants in any way; that the testimony of the intervenors does not show any privity of contract, and no testimony showing a trust fund, and no testimony showing that Shattuck, Marks and Henniger had
148 any notice whatever before the money was turned over to Mrs. Barnes and Martin.

Mr. ALEXANDER: We object to any such proposition as that. This counsel who stands here, *who* was the confidential agent of these defendants, acting for them in their behalf in this matter, and through him we got the information of this transaction. We don't have to show any privity between them, these intervenors and these defendants at all.

The COURT: I will not rule on it at this time. The motion goes in the record.

Mr. IVES: I want to move for judgment dismissing the complaint entirely from this case, both as to the defendants and as to the plaintiffs in intervention on the ground that no testimony has been offered showing any contract, and on the further ground that they cannot get a judgment against the plaintiff-.

The COURT: The motion will be denied at this time.

JOHN H. MARTIN. Being called as a witness on behalf of the plaintiffs, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. IVES:

Q. Mr. Martin, were you the Martin that was a member of the firm of Barnes and Martin?

A. I was.

Q. Were you present at the trial of the "Standard Quartz" case?

149 A. Yes sir; no sir, not at the trial.

Q. Do you know when that case was tried?

A. It was decided on the 5th of January, 1903.

Q. The "Standard Quartz" case?

A. Yes sir.

Q. About that time the verdict was rendered?

A. Yes sir, I know it was rendered on the 5th, I think the evening of the 5th.

Q. By the jury?

A. By the jury.

Q. Where?

A. In this court.

Q. Here in Tombstone?

A. Yes sir.

The COURT: Who was presiding at that time?

The WITNESS: I think you were, Judge Doan.

Mr. O'CONNELL: Judge Kent.

The WITNESS: I guess it was Judge Kent.

Q. Did Judge Barnes try this case?
A. And Mr. O'Connell.
Q. How long was Judge Barnes here in Tombstone prior to the rendition of the verdict?
A. I could not tell you that.
Q. Now, after that trial, do you know where Judge Barnes went?
A. He went to Phœnix.
Q. From Phœnix where did he go?
150 A. He went to New York.
Q. And his trip to Phœnix was after the verdict?
A. After the verdict in the "Standard Quartz" case.
Q. Now, this case, the Standard Quartz case, as well as the "Triangle" case were adverse on the Roy and Leo claims?
A. They were.
Q. Do you know whether or not the discovery monuments of the Roy and Leo claims were on the ground of the Standard Quartz claim?

Mr. ALEXANDER: We object to it; it is immaterial where the manuments were on these claims.

Mr. IVES: I wish to show the extreme absurdity of Judge Barnes *make* the agreement immediately after the victory on the Standard Quartz case, that trial of this litigation that destroyed the Roy and Leo claims, the absurdity of Judge Barnes going to Phœnix and making an arrangement giving up for some services in the Triangle case one-third of his contingent fee in the Standard Quartz case, and Captain Alexander must have been mistaken, and Judge Barnes could not have afforded to give one-third of his fee for the Triangle case, and Judge Alexander was mistaken.

The COURT: Did I understand this witness to say that this case was in June, 1903?

The WITNESS: In January, 1903, and the Triangle the same year, before that.

151 Mr. IVES: Now, Captain Alexander testified that this conversation took place in the early part of January. I want to prove that that was immediately after the successful*ly* verdict, and that that verdict controlled all the other.

Mr. HAYES: The intervenors object to that testimony as being entirely too remote, and being incompetent to establish anything.

The COURT: The objection will be overruled.

(Question read by the Reporter as follows: "Do you know whether or not the discovery monuments of the Roy and Leo claims were on the ground of the Standard Quartz claim")

A. The testimony so disclosed in the Triangle case.

Mr. ALEXANDER: Were you here?

The WITNESS: I was.

Mr. ALEXANDER: Were you at this trial?

The WITNESS: I was here at the trial of the Triangle case.

Mr. IVES: I will conduct my examination first.

Examination by Mr. ALEXANDER:

Q. Were you here at the trial of this Standard Quartz case?
A. No sir.
Q. Then you don't know anything about it?
A. Yes sir, I do.
Q. Were you here on the Standard Quartz case; you were not in the country were you?
A. No, but the question was asked me how I knew that the
152 discovery——
Q. It was hearsay?
A. No sir.
Q. How do you know anything about the Standard case?
A. I am testifying to what the records, and what the testimony disclosed.

Examination continued by Mr. IVES:

Q. Now Mr. Martin, did you receive this telegram from Judge Barnes at about the date on which it was —?
A. I did.

Mr. IVES: I offer that.
Mr. HAYES: We object on the same grounds as the other.
Mr. IVES: It is introduced on the improbability of Judge Barnes having made such a contract.
Said telegram was marked "Exhibit 2" and was now read in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT 2.

(Blank of Western Union Telegraph Co.)

6 Pd.
Received at Benson, Ariz.

JAN. 6/03, HOLLAND HOUSE.

John H. Martin:

I win standard quartz case with jury.

W. H. BARNES."

153 Q. Now Colonel Martin, is this the answer that you sent to that telegram?
A. It is a copy of the answer.

Mr. IVES: Now, we offer this.
Mr. ALEXANDER: We object on the same ground, that it is a self-serving declaration.
The COURT: Objection sustained.
(Said telegram was marked "Exhibit 355 for identification.)
Mr. IVES: Now, I offer in evidence this letter from Judge Barnes to Mr. Martin, dated January 7th.
Mr. ALEXANDER: We certainly object to it as a self-serving declaration, and incompetent, immaterial and irrelevant in this case.

Mr. IVES: It shows the frame of mind that Barnes was in at the time that he made this contract.

Mr. ALEXANDER: It don't make any difference what frame of mind he was in. It does not prove anything here, and does not tend to prove anything. We are not basing our claims here on the "Standard" case; we took the "Triangle" case up, that is the one we perfected the appeal and he made the contract upon, and this does not make any difference.

Mr. IVES: I want to show that Judge Barnes, when he won the "Standard Quartz" case considered that he had won both of the Shattuck cases, and therefore show the absurdity of his offering to give somebody these fees in getting up the papers in the Su-
154 preme Court of the United States.

The COURT: The letter may go in.

Said letter was marked Exhibit 4, and was introduced in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT 4.

"TUCSON, ARIZONA, *Jan.* 7", 1903.

D'R JOHN: Since writing you this A. M. I won both Shattuck cases with jury. He says we are to have ¼ of the ground.

Belle is feeling very blue & I am very sorry for her it breaks me all up. I do not know what to do. I am worse hit than I ever was.

As ever,

W. H. BARNES"

Q. Mr. Martin, who made the original agreement with Shattuck with respect to this litigation?

A. I did.

Q. State where that agreement was made?

A. In the office of Barnes and Martin in Tucson.

Q. What was the agreement; what was said?

Mr. ALEXANDER: Was it oral or in writing?

The WITNESS: Oral.

Q. What was said?

A. Mr. Shattuck came there and employed us to file an adverse against the Roy and Leo for patent, and he said he was in-
155 terested in the Triangle and Iron Prince, and he paid us two hundred and fifty dollars for the adverse against the Roy and Leo, and he said with reference to the Standard Quartz, he said that Hanniger and Marks were part co-owners with him, and that the arrangement would be made with them when the suit came up, and after proceedings were instituted and at the time of the trial, just before the trial of the Triangle case the arrangement was made with reference to the Standard Quartz over here in front of the Arlington Hotel between Mr. Shattuck, Mr. Hanniger and Mr. O'Connell was present. I was present, and I don't know whether Marks was there or not. It was then agreed if we should win the Standard Quartz case that we were to have on fourth of the ground.

Q. Was there any contingent arrangement with respect to the Triangle case?

A. None whatever.

Q. When did you first hear that Street and Alexander, or either of them claimed any interest in this fee?

A. After Judge Barnes' death, some time in either March or April of 1905.

Q. Now, were you with Judge Barnes to any extent in the summer of 1904?

A. Four months off and on.

Q. It was at the time that Mrs. Barnes had an accident?

A. Yes sir, and we talked over our business matters in which I was interested, and at no time did Judge Barnes ever in-
156 dicate or intimate to me that he had made any arrangement with Judge Street or Street and Alexander about a division of fees in the Standard Quartz or any other case.

Q. And did you discuss all of your business arrangements with Judge Barnes?

A. Yes sir, that would have been a matter that Judge Barnes would have called to my attention right away, and he would have done so to Mr. O'Connell. It was not Judge Barnes' nature to do things like that. Judge Street was present when I reached Tucson, I think, at the time of Judge Barnes' death.

Q. Yes?

A. And he was present at the time of the opening of the will, and Judge Street and I talked over Judge Barnes' affairs, and Judge Street——

Mr. ALEXANDER: I object to any statements of Judge Street's here.

Mr. IVES: I asked what did Judge Street say.

Mr. ALEXANDER: I object to it.

Mr. IVES: On what ground.

Mr. ALEXANDER: On the ground that it is barred.

The COURT: Let the question be answered.

Q. What did Judge Street say?

A. I could not state all that he said, but he never made any claim whatever to any fee arrangement between Barnes and Martin, or Judge Barnes with reference to the Standard Quartz case.
157 I never heard of it until after I had returned from New York, which was either in March or April of 1905.

Q. That is all.

Cross-examination by Mr. ALEXANDER:

Q. Well, Barnes never told you that he employed O'Connell in this case.

A. Well, I think that he did.

Q. Barnes never told you about employing him?

A. Who?

Q. Employing O'Connell?

A. The one that suggested that was Mr. Shattuck that Mr. O'Connell would be available to us in as much as he was living in Bisbee, and Mr. O'Connell had been in our office several months before that.

Q. Did you write a letter to Hereford with reference to O'Connell's claim for a fee in this case?

A. I guess I did.

Q. I will ask you if you wrote this letter: "Messrs. Hereford and Hazzard, Tucson, Arizona. Gentlemen: I enclose you herewith a letter from J. M. O'Connell, of Bisbee, Arizona covering two agreements with reference to a group of mining claims in Bisbee. This man O'Connell, as you will probably recall, read law in our office in Tucson a number of years ago, and when we were employed to take up the matters referred to in these agreements he was then in Bisbee and became associated with us in the case, and there
158 never was any agreement whatever in reference to a fee between our firm and Mr. O'Connell. Now that Judge Barnes is dead he insists that one-half of the fee is his by agreement with Judge Barnes. I know this is not so, but to avoid the tying up of the money for any considerable length of time, I would be perfectly willing to settle the matter with him on a basis of one-third, and if this is not satisfactory, I wish you then to bring injunction suit against the payment of any moneys to him on account of law fees. He has, according to his own letter, $625, of which he admits $312 is due us, while I insist two-thirds is due us. You might take the matter up with him and let me know what can be done about it. The next payment will be in April, and the final payment in October. I have no doubt that the payments will be made. Very truly yours, John H. Martin."

A. I meant when I said there was no contract, no contract in writing; there was a contract for all the parties were present. The contract was——

Mr. Alexander: I will offer this inevidence.

Said letter was marked "Exhibit D" and read in evidence, and the same is in the words and figures following, to-wit:

159 Exhibit E.

"(Copy.)

Mch. 9, 1905.

Messrs. Hereford & Hazzard, Tucson, Arizona.

Gentlemen: I enclose you herewith a letter from J. M. O'Connell, of Bisbee, Arizona, covering two agreement- with reference to a group of mining claims in Bisbee. This man O'Connell, as you will probably recall, read law in our office in Tucson a number of years ago, and when we were employed to take up the matters referred to in these agreements he was then in Bisbee and became associated with us in the cases, and there never was any agreement whatever in reference to a fee between our firm and Mr. O'Connell.

Now that the Judge is dead he insists that one-half of the fee is his by agreement with Judge Barnes. I know that this is not so, but to avoid the tying up of the money for any considerable length of time, I would be perfectly willing to settle the matter with him on a basis of one-third, and if this is not satisfactory, I wish you then to bring injunction suit against the payment of any moneys to him on account of law fees. He has, according to his own letter, $625, of which he admits $312 is due us, while I insist two-thirds is due us. You might take the matter up with him and let me know what can be done about it. The next payment will be in
160 April and the final payment in October. I have no doubt that the payments will be made.

Very truly yours,

(Signed) JOHN H. MARTIN."

(enc.)

A. The only dispute that Mr. O'Connell had about it was as to the fee.

Q. You stated what he had?

A. Yes, he was to have a third.

Q. You said rather than have a fight you would give him a third?

A. Yes sir.

Q. Judge Barnes wrote you?

A. He wrote me and told me of the arrangement which he had with Judge Barnes, that he had agreed to share the fee with him, one-third to him, one-third to Barnes and Martin and one-third to O'Connell, and that is the first time that I ever heard of the arrangement.

Q. In fact, he did write you?

A. That was after I had gone back to New York.

Q. He did write you?

A. Yes sir.

Q. Mr. O'Connell also wrote and told you that he was entitled to this fee?

A. He didn't do anything of the kind.

Q. How did you know that he claimed it; what did you write that letter for?

A. Mr. O'Connell had all the money.

Q. Didn't he write you and tell you?

A. We considered——

161 Q. Didn't he write you?

A. Why, certainly he did.

Q. That was after Judge Barnes' death wasn't it, that he wrote you?

A. Well, Mr. O'Connell had been in correspondence for several years I guess.

Q. But after Judge Barnes' death he wrote you about this fee of this contingent contract with these defendants?

A. Why, I knew what it was. He wrote me; we were in communication, certainly.

Q. That was after Judge Barnes' death?

A. Yes, and before.

Q. What did you write this letter for? What did you mean by this?

A. O'Connell wrote me that he got the money.

Q. That was after Judge Barnes' death?

A. Certainly, after Judge Barnes' death.

Q. That was the first time that you knew that *you* claimed one half of the fee?

A. Yes sir.

Q. That is the first time?

A. In 1904, before Judge Barnes' death Mr. O'Connell collected twelve hundred dollars.

Q. What did you mean when you sent this letter to Hereford in 1905?

A. Yes.

Q. "This man O'Connell, as you will remember, read law
162 in our office in Tucson a number of years ago, and when we were employed to take up the matters referred to in these agreements he was then in Bisbee and became associated with us in the cases, and there never was any agreement whatever in reference to a fee between our firm and Mr. O'Connell." What did you mean by that?

A. No agreement in writing.

Q. You didn't say anything in regard to writing here, did you?

A. That is what I meant.

Q. What did you mean by this: "Now that Judge is dead he insists that one-half of the fee is his by agreement with Judge Barnes. I know that this is not so."

A. I meant that the original agreement was one-third and Barnes and Martin two-thirds. After Judge Barnes' death when he wrote me at New York, he claimed half the fee, and said that Judge Barnes had made arrangement to give him half the fee.

Q. Now Mr. Martin, that is your signature, ain't it; you wrote that letter to Judge Street, didn't you?

A. Yes sir.

Q. Did you say this to Judge Street. This is dated March 14, 1905. "I got yours of the 8th this morning. I had supposed that I would be able to be in Arizona the latter part of May——

Mr. IVES: I don't think that is material, may it please Your Honor.

163 Q. Well now, what did you mean when you said in that letter——

Mr. IVES: I object to it as incompetent, irrelevant and immaterial.

The COURT: Objection sustained.

Examination by Mr. HAYES:

Q. Mr. Martin, you have stated on direct examination that Judge Street did not say anything to you about having or claiming an interest in this fee at all after the death of Judge Barnes?

A. He did.

Q. You did know, however, prior to the death of Judge Barnes that Judge Street was assisting in the trial of these cases, didn't you?

A. No, I understood from Judge Barnes that as a matter of favor and friendship, and in consideration of services that Judge Barnes was rendering Judge Street in the east he would look after some cases in the Supreme Court for him owing to his absence.

Q. You had such an understanding?

A. Yes, I certainly did; that is the fact.

Q. You say that both you and Judge Street were present at the time of Judge Barnes' death?

A. No, I was not present, and Judge Street was not present, but we met there together before Judge Barnes was buried.

Q. You say at that time he said nothing to you about the interest in the estate?

A. He did not.

164 Q. Isn't it a fact that Judge Barnes and Judge Street were very warm friends?

A. They were.

Q. Would you consider that that was a good time for a personal friend to talk about a matter of that kind?

A. He would, that he had taken the affairs of the estate, he would with me.

Q. Now, you say that you were present and Judge Street was present at the time of the opening of the Barnes will?

A. I think so.

Q. That followed pretty soon *as* his death?

A. He was not buried but a week or ten days; I think it was in a day or two after the remains were buried.

Q. That is a very solemn occasion between friends?

A. Yes sir.

Q. Did you expect Judge Street would discuss such a proposition at that time with you?

A. Well, I was in Tucson for some time after that, and Judge Street was there also, and we discussed Judge Barnes' affairs.

Examination by Mr. ALEXANDER:

Q. How long was Street there?

A. I could not answer that question exactly.

Q. Two or three days, that is all wasn't it?

A. I have letters from which he wrote me from Tucson I think, maybe after he returned to Phœnix before I returned east, but I wrote him from New York immediately after reaching

165 there, because he had charge of Mrs. Barnes' estate, and was advising her.

Q. When did you assign this account to Mrs. Barnes?

A. At the time of the date of it.

Q. Have you got a copy of the contract of assignment?

A. I don't know; I guess I have.

Mr. IVES: Was it before the commencement of this action?
The WITNESS: Yes sir.

Witness excused.

Mr. IVES: We rest.
Mr. O'CONNELL: The defendants have no testimony.

And this was all the evidence given in said cause.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, John W. Walker, Official Court Reporter of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise do hereby certify that the above and foregoing fifty-seven (57) pages of typewritten matter constitute and contain a full, true and correct copy of all questions propounded to witnesses, and their answers thereto, as well also as all objections and exceptions made and taken by counsel for the respective
166 parties during the trial of said cause, and also all rulings and judgments given and rendered by the Judge presiding, and also all documentary evidence in the cause wherein Belle J. Barnes is plaintiff, and J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, deceased Intervenors, vs. L. C. Shattuck, H. R. Hanniger and Emil Marks, are defendants, No. 5058, and that they contain all of the evidence given and offered, both oral and documentary.

In witness whereof, I have hereunto set my hand in my official capacity as such Reporter at Tombstone, in said County and Territory this 21 day of July, A. D. 1910.

JOHN W. WALKER,
Official Court Reporter, Second Judicial District, Territory of Arizona, in and for the County of Cochise.

I hereby certify that the foregoing fifty-seven pages of the Reporter's transcript (as amended) is correct as agreed to and certified by counsel for the appellee and appellant respectively, and presented to me on the second day of September, A. D. 1910, and by me on this third day of September, 1910, approved.

FLETCHER M. DOAN,
Trial Judge.

167 And on to-wit: the ninth day of November, 1910, being one of the regular juridical days of the January Term of said Court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. J. L. B. Alexander, for appellees, it is ordered by the Court that he be granted thirty days' additional time within which to file brief.

And on to-wit: the tenth day of January, 1911, being one of the regular juridical days of the January Term of said Court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day on motion of Mr. S. L. Pattee for appellant, it is ordered by the Court that appellant and appellees herein, each be granted one-half hour for oral argument in this cause, and the hearing set for January 13, 1911.

And on to-wit: the thirteenth day of January, 1911, being one of the regular juridical days of the January Term of said
168 Court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for hearing, was argued by Eugene S. Ives, Esq., for appellant, and Wm. M. Seabury, Esq., for appellees, and cause ordered submitted.

169 And on to-wit: the twenty-fifth day of March, 1911, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1169.

BELLE J. BARNES, Appellant,
vs.
L. C. SHATTUCK et al., Defendants; MARY E. STREET, Executrix, and J. L. B. ALEXANDER, Intervenors, Appellees.

Appeal from the District Court in and for the County of Cochise, Before Justice Doan.

Mr. Eugene S. Ives for Appellant.
Messrs. Alexander & Christy and Mr. William M. Seabury for Appellees.

Opinion by Doe J.

Belle J. Barnes filed a complaint in the District Court of Cochise County against L. C. Shattuck, H. R. Hanninger and Emil Marks, defendants, alleging that William H. Barnes and John H. Martin, attorneys and co-partners, had entered into a contract with the said defendants to act as their attorneys in certain mining litigation between them and one Martin Costello, involving the title and right of

possession to certain mining claims, by the terms of which said contract Barnes and Martin were to receive as compensation for
170 their services from said defendants one fourth of all money or property received by them as the result of said litigation or by way of settlement or compromise thereof; that Barnes and Martin had fully performed the contract on their part; that pending the litigation a compromise was effected between defendants and Costello, in pursuance of which the defendants had received a large sum of money and a considerable amount of the capital stock of a mining company; that by reason thereof Barnes & Martin became entitled to a one fourth of the money and stock so received by the defendants; that under the will of her deceased husband, William H. Barnes, which had been duly probated, all of his estate had been assigned and distributed to her, and that she was the assignee of all the interest of Barnes and Martin under said contract; the prayer being for an accounting by the defendants of the moneys and stocks so received by them and that they be decreed to pay her one-fourth of the money so received and assign to her one-fourth of the stock. Pending the suit of Mrs. Barnes against said defendants, a petition in intervention was filed by Mary E. Street, executrix of the estate of Webster Street, and J. L. B. Alexander, setting forth that during the pendency of the litigation between the defendants and Costello, J. L. B. Alexander and Webster Street were attorneys practicing their profession in the city of Phœnix; that Street and Alexander were employed by Barnes and Martin and O'Connell, the attorneys for defendants in their litigation with Costello, to perform certain professional services in connection with such litigation, for
171 which said services the said Barnes and Martin agreed and promised the said Street and Alexander that they would share with them the said fee, and promised them one third thereof; that is, that O'Connell was to receive one third, Barnes and Martin one third and Street and Alexander one third of the contingent fee of one fourth of the money and property received by the defendants upon the termination of the litigation by compromise or otherwise, and praying that O'Connell be made a party defendant, that an accounting be had between all parties, and that the interveners be decreed one third of the money and property constituting the contingent fee. Demurrers and general denials to the complaint in intervention were filed by both plaintiff and defendants.

The defendants pleaded the payment to O'Connell of eighteen thousand, seven hundred and fifty dollars, being one fourth of the recovery, and the payment by him to Belle J. Barnes executrix of William H. Barnes, deceased, and assignee of Barnes and Martin, of the sum of twelve thousand five hundred dollars.

The demurrers were overruled and this appeal is prosecuted from a judgment in favor of interveners and against the plaintiff for the sum of six thousand, two hundred and fifty dollars. Appellant assigns as error the overruling of her demurrer to the petition in intervention on the grounds that the facts therein stated do not constitute a cause of action nor a ground for intervention. As to the sufficiency of the allegations of the petition to constitute a cause of

action, we are of the opinion that it sufficiently sets forth
172 facts which indicate an intention to make the fund a security for the debt, and brings the pleading within the holding of the Supreme Court of the United States in the cases of Walker v. Brown, 165 U. S. 654, and Ingersoll v. Coram, 211 U. S. 335.

As to the other ground of demurrer, paragraph 1278 Rev. Stat. 1901, provides:

"Any person who has an interest in the subject matter of the suit, which can be affected by the judgment, may, on leave of the court or judge, intervene in such suit or proceeding at any time before the trial."

The appellant must have instituted her action upon the theory that the fee of Barnes and Martin consisted of an equitable interest in the proceeds of the compromised litigation to the extent of one fourth of the money and property received by the defendants thereunder. Under no other theory than that of an equitable assignment might she invoke an accounting and a decree requiring the defendants to transfer and assign to her one-fourth of all the stock in said corporation received by them.

The interveners filed their petition reciting an agreement between Barnes and Martin, and Street and Alexander, by the terms of which the latter, in consideration of professional services rendered in said mining litigation, were to receive one third of the share of Barnes and Martin in the proceeds of such litigation, or any compromise thereof, whether in money or property.

If Barnes and Martin were possessed of an equitable in-
173 terest in a fixed portion of the proceeds of the compromise and, by virtue of their agreement, Street and Alexander became the owners of, or entitled to, an equitable interest in Barnes and Martin's share, then clearly they were possessed of an interest in the subject matter of the action of such a direct and immediate character that "they would either gain or lose by the direct legal effect and operation of the judgment," and under any construction which may — given the statute, were entitled to intervene.

It is urged by the appellant that the evidence fails to establish an equitable assignment of any part of Barnes and Martin's fee or share in the proceeds of the compromise.

To constitute an equitable assignment good as between the assignor and assignee, it is not essential that the debt should have been earned or the fund be in esse at the time of the assignment, or that notice be given the present or future holder of the fund. The intent of the parties to create the lien being apparent, it is sufficient that there be a reasonable expectancy that the debt will be fully earned and the fund come into existence.

Sykes v. First National Bank, (S. D.) 49 N. W. 1058.
Mitchell v. Winslow, (U. S. C. C.) 12 Fed. Case. 527.

Whether the agreement in this case constitutes an equitable assignment of that portion of Barnes and Martin's fee in question, is

dependent upon the intent of the parties as evidenced by
174 the terms of the agreement in the light of all the surrounding circumstances.

Ingersoll v. Coram, Supra.

It appears from the record that Barnes, during the conduct of the litigation between his clients and Costello, felt it important in the interest of his clients that a motion for a rehearing in this court should be resisted, and this if granted and judgment rendered in favor of Costello, an appeal should be taken to the United States Supreme Court, and that to perform such services he retained the firm of Street and Alexander.

Alexander testified:

"* * * finally Judge Barnes made this expression, 'Now I want you to attend to this case: I have to go back to New York. Now, if you will attend to this case, if you will agree to attend to this case, I will give you one-third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger and Marks. Mr. O'Connell who is associated with me is entitled to the other third.' * * *"

Judge Barnes in a letter to his partner, Martin, said: "I won both Shattuck cases with jury. He says we are to have one-fourth of the ground." Alexander's testimony that "I didn't consider that the estate of Barnes owed us anything: I considered that I had an interest in this claim," taken alone and indicating the understanding of the agreement of only one of the parties to it, would have
175 little weight, as the understanding of the other party might have been entirely different, but taken in connection with the theory upon which plaintiff instituted her action at a time when she presumably possessed some general knowledge of the contract between Barnes and Martin to whose interest she succeeded and the defendants, and the statement of Judge Barnes in his letter indicating an understanding that the contingent fee of Barnes and Martin gave them an interest in the proceeds of the litigation, color is given to the theory that by the words "I will give you one-third of the fee," it was his intention that an equitable assignment should be created rather than a personal liability.

The judgment of the trial court could only have been rendered upon the finding that the evidence showed it to have been the intent of the parties that Street and Alexander should rely on the proceeds of the litigation rather than on the personal liability of Barnes or the firm of Barnes and Martin.

There being substantial evidence tending to support such finding, it must be treated as conclusive here.

That the compensation may have been large in proportion to the services rendered, is immaterial, the parties having full knowledge of their character and relative importance.

It is urged that the admission of the testimony of Alexander to conversations with Barnes was error under the provisions of Sec. 2536 Rev. Stat. 1901; but the statute in question is applicable only

to actions "by or against executors, administrators or guard-
176 ians in which judgment may be rendered for or against them as such," and to "all actions by or against the heirs or legal representatives of the deceased." As the plaintiff sued in her individual capacity, the action was not within the provisions of the statute.

Error is predicated upon the rendition of judgment against the plaintiff in favor of the interveners, upon the theory that as interveners claimed an equitable interest in the fee or fund and did not plead payment to the plaintiff, judgment could only have been rendered against the defendants; but the defendants pleaded the payment and after the filing of their answer setting up such payment the plaintiff moved to dismiss as to the defendants. The motion was taken under advisement by the court, and, in effect, granted by the final judgment rendered.

The plaintiff did not deny that payment had been made as pleaded by the defendants after such suit was brought, and by the motion in effect admitted the truth of such averment, and, consequently, judgment was properly rendered against the holder of the fund. The exclusion of a copy of the telegram sent by Martin to Barnes is assigned as error, but no foundation was laid for the introduction of secondary evidence, and the rule that permits evidence of the understanding of the parties to an oral agreement, of its effect, does not extend to a party to an oral contract who was not present and did not in any way participate in the making of such contract.
177 The excluded testimony as to statements of Costello and his attorneys respecting the appeal to the United States Supreme Court in the "Triangle" case, could from no point of view, have been competent, and, if competent, could not have affected the result.

No reversible error appearing, the judgment of the District Court is affirmed.

EDWARD M. DOE, *A. J.*

We concur:

EDWARD KENT, *C. J.*
JOHN H. CAMPBELL, *A. J.*
ERNEST W. LEWIS, *A. J.*

178 And on the same day to-wit: The twenty-fifth day of March, 1911, being one of the regular juridical days of the January Term of said Court, 1911, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1169.

BELLE J. BARNES, Appellant,
vs.
L. C. SHATTUCK et al., Defendants; MARY E. STREET, Executrix, and J. L. B. ALEXANDER, Intervenors, Appellees.

This cause having been heretofore submitted, and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed, that the appellees herein do have and recover of any from the appellant herein, and of and from L. H. Manning and Epes Randolph, the sureties on the cost and Supersedeas appeal bond herein, the sum of Six Thousand Two Hundred and fifty ($6,250). Dollars, with legal interest thereon from the first day of May, 1909, until paid, together with appellees' costs in this court incurred in this cause, taxed at thirty-nine ($39.00) Dollars, and appellees accruing costs in the court below, and that appellees have execution therefor.

179 And on to-wit: the fifth day of April 1911, came the Appellant by her attorney and filed in the clerk's office of said court in said entitled cause her certain Motion for Re-hearing in words and figures following to-wit:

In the Supreme Court of the Territory of Arizona.

BELLE J. BARNES, Appellant,
vs.
L. C. SHATTUCK et al., Defendants; J. L. B. ALEXANDER et al., Intervenors and Appellees.

Motion for Rehearing.

Comes now the above named appellant Belle J. Barnes, by Eugene S. Ives, her attorney, and move the above named Court for a rehearing of the above entitled cause upon the following grounds:

1. That this court erred in holding that the evidence showed that the transaction between Barnes & Martin and Street & Alexander amounted to an equitable assignment, or that the evidence was sufficient to sustain a find—that such was the effect of the transaction.

2. That this court erred in holding that the amended complaint in intervention showed any right in the intervenors to intervene herein, or showed that said intervenors had such an interest in the subject of this action as to entitle them to intervene.

3. That this court — in holding that evidence of payment to the plaintiff subsequent to the commencement of this action was admissable, the same not having been pleaded by the intervenors.

180 4. This court erred in not modifying the judgment of the court below by reducing the judgment to the sum of $5,312.50. The evidence and the record conclusively show, as pointed out in the briefs filed by appellant, that Mrs. Barnes received only $10,625.00. Even if judgment were properly rendered against her, the judgment ought not to have been for more than one-half of the amount she received. The assignments of error presenting this question were not passed upon by the court nor mentioned in its opinion. It is insisted that this position is well taken and the judgment should, at least, be modified accordingly.

Wherefore, appellant respectfully prays that this court vacate the judgment of affirmance entered herein and grant a rehearing of this cause.

Dated Tucson, Arizona, April 4th, 1911.

EUGENE S. IVES,
Attorney for Appellant.

Proof of service of Motion of Rehearing on Counsel for Appellees attached.

181 And on to-wit: the fourth day of May, 1911, being one of the regular juridical days of the January Term of said Court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellant, be submitted.

And on to-wit: the sixth day of May, 1911, being one of the regular juridical days of the January Term of said Court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellant and heretofore submitted, be, and the same is hereby, denied.

182 And on to-wit the twelfth day of May, 1911, came Belle J. Barnes by her attorney and filed in the clerk's office of said court in said entitled cause her certain Petition for Appeal, the Assignments of the same and the Order fixing the Amount of Supersedeas Bond in words and figures following to-wit;

(Title of Court and Cause.)

The above named appellant, Belle J. Barnes, and L. H. Manning and Epes Randolph, sureties upon the supersedeas bond given upon appeal to the Supreme Court of the Territory of Arizona, conceiv-

ing themselves aggrieved by the Judgment of the Supreme Court of the Territory of Arizona, made and entered on the 25th day of March, 1911, in favor of the above named appellees and against the said appellant and the said sureties, which judgment became final on the 6th day of May, 1911, by the denial of a motion for rehearing of said cause, do hereby appeal from the said judgment of the Supreme Court of the Territory of Arizona to the Supreme Court of the United States, and pray that their appeal be allowed and that a transcript of the record and proceedings in said cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated May 11th, 1911.

EUGENE S. IVES,
Attorney for Appellants.

And now, on this 11th day of May, 1911, the appeal is al-
183 lowed as above prayed, and the amount of the supersedeas bond on appeal is hereby fixed at the sum of Ten Thousand Dollars and upon the filing of such supersedeas bond, approved by any justice of the Supreme Court of the Territory of Arizona, within sixty days from the day said judgment became final, let all further proceedings upon said judgment be stayed until the determination of said appeal.

JOHN H. CAMPBELL,
Associate Justice, Supreme Court, Territory of Arizona.

And on to-wit: the thirteenth day of May, 1911, came the appellant Belle J. Barnes, by her attorney, and filed in the clerk's office of said court, in said entitled cause a certain Supersedeas and Cost Bond on Appeal, in words and figures following to-wit:

(Title of Court and Cause.)

Know all men by these presents: That we, Belle J. Barnes, L. H. Manning and Epes Randolph, as principals, and Chas. F. Hoff, W. J. Corbett and Alexander Rossi and W. E. Murphey as sureties are held and firmly bound unto J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, deceased, in the full and just sum of Ten Thousand Dollars, to be paid to the said J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, deceased, their certain attorneys, executors, administrators, successors or assigns, to
184 which payment well and truly to be made, we bind ourselves our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 12th day of May, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a session of the Supreme Court of the Territory of Arizona, in a suit depending in said court between Belle J. Barnes, appellant, and L. C. Shattuck, H. R. Manninger and Emil Marks, defendants; and J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, deceased, intervenors and appellees, a final judgment was rendered against the said Belle J. Barnes, ap-

pellant, and in favor of the said J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, deceased, intervenors and appellees, on the 25th day of March, 1911, in all things affirming the judgment of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, therein appealed from, and adjudging and decreeing that the said intervenors and appellees, J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, deceased, do have and recover of and from the said appellant, Belle J. Barnes, and of and from L. H. Manning and Epes Randolph, sureties upon the supersedeas bond on appeal, the amount of the judgment appealed from, with costs in both said courts;

And whereas, the said appellant, Belle J. Barnes, did duly move the said Supreme Court of the Territory of Arizona for a rehearing of said cause, which motion was, on the 6th day of May,
185 1911, by order of said court, in all things denied: and

Whereas, the said Belle J. Barnes and the said L. H. Manning and Epes Randolph have obtained the allowance of an appeal to the Supreme Court of the United States to reverse the said judgment of the said Supreme Court of the *said Supreme Court of the* Territory of Arizona in the aforesaid suit, and a citation directed to the said J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, deceased, citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington, sixty days after the date of said citation.

Now, the condition of the above obligation is such, that if the said Belle J. Barnes, L. H. Manning and Epes Randolph shall prosecute said appeal to effect, and answer all costs and damages if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

BELLE J. BARNES.	[SEAL.]
EPES RANDOLPH.	[SEAL.]
L. H. MANNING.	[SEAL.]
CHAS. F. HOFF.	[SEAL.]
W. J. CORBETT.	[SEAL.]
ALEXANDER ROSSI.	[SEAL.]
W. E. MURPHEY.	[SEAL.]

Approved as a supersedeas and cost bond by

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

186 TERRITORY OF ARIZONA,
County of Pima, ss:

Chas. F. Hoff, W. J. Corbett, Alexander Rossi and W. E. Murphey being duly sworn, doth, each for himself and not one for the other, depose and say; that he is one of the sureties named in and who executed the foregoing bond; that he is a resident and freeholder of the County of Pima and Territory of Arizona, and is

worth the sum of Ten Thousand Dollars, specified in the foregoing bond, over and above all his just debts and liabilities, and exclusive of property exempt by law from execution or forced sale.

CHAS. F. HOFF.
W. J. CORBETT.
ALEXANDER ROSSI.
W. E. MURPHEY.

Subscribed and sworn to before me this 12th day of May, 1911.

R. W. LANGWORTHY,
[SEAL.] *Notary Public in and for Pima County, Arizona.*

My commission expires August 10, 1914.

187 And on to-wit the eleventh day of July, 1911, came Belle J. Barnes et al. by their attorney and filed in the clerk's office of said court in said entitled cause their certain Assignments of Error in words and figures following, to wit:

(Title of Court and Cause.)

Assignments of Error.

And now, to-wit, on the 10th day of July, 1911, before the Justices of the Supreme Court of the United States at the Capitol in the city of Washington, come the said appellants by Eugene S. Ives, their attorney, and say that in the record and proceedings aforesaid, there is manifest error committed by the Supreme Court of the Territory of Arizona, in this to-wit:

I.

The Supreme Court of the Territory of Arizona erred in not sustaining the first assignment of error made by the appellant Belle J. Barnes upon appeal to the said Supreme Court, which said first assignment of error is as follows:

"The Court erred in overruling the demurrer of the plaintiff to amended complaint in intervention, upon the ground that the facts stated therein do not constitute a ground for intervention or show any right to intervene, for the reason that it appears upon the face of said complaint in intervention that the intervenors were not the owners of and did not have any lien upon any part of the claim or demand sued upon by the plaintiff, and that said amended complaint in intervention does not show facts which would amount to an assignment either legal or equitable, of any portion of said claim or demand, but merely shows that the intervenors were creditors of the late firm of Barnes & Martin."

188 and in not reversing the judgment appealed from on account of said error, and in holding that in the ruling of the District Court therein complained of, there was no error.

II.

The said Supreme Court of the Territory of Arizona erred in holding that the said District Court did not err in admitting evidence of any payment made to the plaintiff after the commencement of this action and after the filing of the complaint in intervention for the following reasons:

a. Because the amended complaint in intervention did not state facts sufficient to entitle the intervenors to intervene, for the reason stated in the first assignment of error.

b. Because evidence of any such payment was not within the issues tendered by the pleadings, and was not in any manner pleaded by the intervenors, and that there was no pleading, supplemental or otherwise, upon which to base such evidence.

c. Because proof of such payment was entirely immaterial, and could not give the intervenors a right to recover a judgment against the plaintiff, the sole right of the intervenors being to enforce the collection of their claim against the surviving partner of the firm of Barnes & Martin, or, at most, against the defendants in this action.

d. Because the money, if paid to the plaintiff, did not constitute a specific fund which the intervenors might trace and follow into whose hands it may have come,"

and in holding that in the ruling therein complained of, there was no error.

189

III.

The said Supreme Court of the Territory of Arizona erred in not sustaining the fourth assignment of error made by the said appellant Belle J. Barnes, as follows:

"The Court ered in sustaining the intervenors' objection to the following question:

"What, if anything, did Costello or his attorneys say in these negotiations with respect to the 'Triangle' appeal to the Supreme Court of the United States.' "

and in holding that in the ruling set forth in the said assignment of error there was no error.

IV.

The said Supreme Court of the Territory of Arizona erred in not sustaining the fifth assignment of error made by the said appellant Belle J. Barnes upon appeal to the said court as follows:

"The court erred in permitting the witness Alexander to testify as to conversation between himself and Judge Barnes, and in overruling plaintiff's objection thereto, for the reason that the witness was incompetent to testify under the provisions of Paragraph 2536 of the Revised Statutes of Arizona, 1901,"

and in holding that in the ruling therein complained of there was no error.

190 V.

The District Court erred in sustaining the objection of the intervenors to the introduction in evidence of the telegram Exhibit "3," as follows:

"Congratulate you great victory as wins all three cases", for the reason that said telegram was competent and admissible as bearing upon the reasonableness or probability of Wm. H. Barnes having made the alleged agreement with Street and Alexander, as testified to by the witness Alexander; and the said Supreme Court of the Territory of Arizona erred in not sustaining the assignment of error complaining of said ruling, and in holding that in the said ruling there was no error.

VI.

The said Supreme Court of the Territory of Arizona erred in affirming the judgment of the District Court therein appealed from, for the reason that said District Court erred in rendering judgment in favor of the intervenors and against the appellant for the following reasons:

"*a*. Because the amended complaint in intervention was insufficient to entitle the intervenors to intervene or to entitle them to any relief against the plaintiff, for the reasons stated in the first assignment of error.

b. Because the judgment was excessive and erroneous in that it included a portion of the moneys paid by O'Connell to Martin, and it was not shown that any portion of the money paid to Martin was ever received by the plaintiff."

191 VII.

The said Supreme Court of the Territory of Arizona erred in holding and ruling that the facts stated in the amended complaint in intervention was sufficient to entitle the intervenors to relief against the plaintiff, and in overruling the assignment of error with respect thereto, and in not reversing the said judgment so appealed from because the said amended complaint in intervention did not state facts entitling the intervenors to any relief or judgment against the plaintiff.

VIII.

The said Supreme Court of the Territory of Arizona erred in not reversing the judgment of the said District Court because the said judgment was excessive and erroneous in part for the reason that it appeared that the sum of $1875. had been paid to John H. Martin as surviving partner of the firm of Barnes & Martin, and that no part of the same had been received by the said Belle J. Barnes, and that the said Belle J. Barnes could in no event be held liable for more than one-half the amount she actually received, and it clearly appeared that the judgment was excessive to the extent of one-half of said sum of $1875.

IX.

The said Supreme Court of the Territory of Arizona erred in not modifying the judgment appealed from by deducting therefrom one-half of said sum of $1875., or requiring the remission thereof as a condition affirming said judgment, and in sustaining the action of the District Court in rendering judgment for the full amount claimed, for the reasons stated in the last preceding
192 assignment of error.

X.

There is error also in this: that judgment was given against said appellants, whereas by the law of the land the said judgment ought to have been given for the said appellants and against the said appellees.

Wherefore, the said appellants pray that the judgment aforesaid rendered by the Supreme Court of the Territory of Arizona against the said appellants in error may be reversed, annulled and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment.

EUGENE S. IVES.
Attorney for Appellants.

And on to-wit: the eighteenth day of August, 1911, came the Appellant, Belle J. Barnes, by her Attorney and filed in the Clerk's Office of said Court, in said entitled cause a certain Statement of Facts in words and figures following to-wit:

193 In the Supreme Court of the Territory of Arizona.

BELLE J. BARNES, Appellant,
vs.
L. C. SHATTUCK, H. R. HANNINGER, and EMIL MARKS, Defendants; J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, Deceased, Intervenors and Appellees.

Statement of Facts.

An appeal having been taken from the judgment of the Supreme Court of the Territory of Arizona to the Supreme Court of the United States, the Supreme Court of the Territory of Arizona makes and certifies the following statement of facts in the nature of a special verdict:

1. For a number of years prior to November 10th, 1904, William H. Barnes and John H. Martin were copartners, engaged in the practice of law at the City of Tucson, Pima County, Arizona, under the firm name of Barnes & Martin, each member of said firm being duly admitted to practice in all the courts of the Territory of Arizona.

2. From some time in 1902 until September 1st, 1907, Webster Street and J. L. B. Alexander were attorneys at law, duly admitted to

practice in all the courts of the Territory of Arizona, and in
194 the Supreme Court of the United States, and engaged in the practice of their profession at Phœnix, Arizona, as partners under the firm name of Street and Alexander.

3. In 1901, one Martin Costello, claiming to be the owner of the Roy and Leo Mining claims, in Warren Mining District, in Cochise County, Arizona, made application to the proper United States Land Office for a patent to those mining claims. The defendants Shattuck, Hanninger and Marks were the owners of the Standard Quartz claim, and the defendant Shattuck and another were the owners of the Triangle and Iron Prince claims, which all conflicted with the Roy and Leo claims of Costello.

4. During the pendency of Costello's application for a patent for the Roy and Leo claims, the defendant- Shattuck, Hanninger and Marks employed the firm of Barnes & Martin, as their attorneys, to file adverse claims against Costello's application for a patent on account of the conflict of the Roy and Leo claims of Costello with the Standard Quartz, Triangle and Iron Prince claims.

5. Pursuant to such employment, Barnes & Martin did cause to be filed in the said United States Land Office adverse claims against the issuance of the patent applied for by Costello, and thereafter, within thirty days, brought suits on behalf of Shattuck and the other claimants of the Standard Quartz, Triangle and Iron Prince claims, in support of the adverse claims so filed to determine the right to the ground in controversy between the parties.

195 6. Three of such suits were brought, the basis of one suit being the conflict between Costello's claims and the Triangle claim, the suit being referred to in the record as the "Triangle" suit, another the conflict with the Standard Quartz claim, referred to in the record as the "Standard Quartz" case, and the third the conflict with the Iron Prince claim, referred to in the record as the "Iron Prince" case. All these suits were brought in the District Court of Cochise County, Arizona, where the property was situated.

7. In the prosecution of these suits, Barnes & Martin associated with themselves, one J. M. O'Connell, an attorney at law, residing at Bisbee, in said Cochise County.

8. About the time of the commencement of said suits and while the same were pending, an agreement was made between Barnes and Martin and O'Connell on the one hand, and Shattuck, Hanninger and Marks, on the other, with respect to the compensation of said attorneys for their services in said suits. Such agreement was that the attorneys were to receive as their compensation one-fourth of all moneys or properties received by said Shattuck, Hanninger and Marks, as the result of the litigation or by way of settlement or compromise thereof.

9. Pursuant to such employment and agreement for compensation, said Barnes & Martin and O'Connell did conduct said suits on behalf of said Shattuck, Hanninger and Marks. The suit involving the conflict with the Triangle claim, known as the "Triangle" case was tried, and judgment was rendered in favor of Costello. From
196 such judgment an appeal was taken by Shattuck, Hanninger and Marks to the Supreme Court of the Territory of Arizona.

This appeal was heard, and on March 18th, 1902, the opinion of the Supreme Court of the Territory of Arizona was delivered, reversing the judgment appealed from. Subsequently, Costello filed a motion for a rehearing of said cause, claiming that the appeal should be dismissed, for the reason that the appeal bond had not been filed within the time required by the statutes of Arizona, and the Supreme Court had consequently acquired no jurisdiction of such appeal.

10. While the appeal in the Triangle case was pending, the suit involving the conflict with the Standard Quartz claim, and known as the "Standard Quartz" case was tried, resulting in a judgment in favor of Shattuck, Hanninger and Marks, and against Costello. From such judgment Costello prosecuted an appeal to the Supreme Court of the Territory of Arizona.

11. After the filing of Costello's motion for a rehearing of the Triangle case, and in the latter part of January, 1903, William H. Barnes, acting on behalf of the firm of Barnes & Martin, called upon the firm of Street & Alexander, at their office in Phœnix, Arizona, and engaged their services to oppose the motion for a re-hearing of the Triangle case, and in the event of an adverse decision upon said motion, to perfect an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the Territory of Arizona. The question of the compensation of Street & Alexander was orally discussed at that time, and an oral agreement made between said firm of Barnes & Martin by Mr. Barnes, the senior
197 member of the firm, and the firm of Street & Alexander with respect thereto, the oral statement and proposition or offer of said Barnes being in the following language:

"Now, I want you to attend to this case (referring to the Triangle case). I have to go back to New York. Now, if you will attend to this case, if you will agree to attend to this case, I will give you one-third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger and Marks. Mr. O'Connell, who is associated with me is entitled to the other third."

That Judge Barnes, for the firm of Barnes & Martin, and Street & Alexander had several conferences relative to the contingent fee which Barnes & Martin were to receive from Shattuck, Hanninger and Marks, in which Barnes told Street & Alexander that the fee was one-fourth of whatever was realized from the prosecution of the cases for Shattuck, Hanninger and Marks, and told them that they, Street & Alexander should get one-third of that, if they cared to take up and perfect the appeal and argue the case before the Supreme Court on the motion for the rehearing and perfect the appeal in the Triangle case, and that Street & Alexander agreed to do it, accepted his offer and did the work. That the whole litigation turned upon this: That Shattuck, Hanninger and Marks were anxious to get a title to the claims and get the patent; and this proceeding was an adverse and delay in getting patent, and Judge Barnes wanted to hold this matter and force a compromise from them. That Barnes &
198 Martin had but the one contract with Shattuck, Hanninger and Marks for a contingent fee."

That Webster Street, one of the firm of Street & Alexander, there-

after argued the motion for re-hearing in the Triangle case on behalf of Shattuck, Hanninger and Marks. The motion for a re-hearing of that case was granted by the court and the appeal was dismissed for the reason that the appeal bond was not filed in time, leaving the judgment appealed from in full force.

12. While the motion for a re-hearing of the Triangle case was pending before the Supreme Court of the Territory of Arizona, the appeal taken by Costello from the judgment in the Standard Quartz case came on for hearing before said Supreme Court, and was submitted upon printed arguments and briefs, at the January, 1903, term of that court. Street & Alexander at the request of Barnes, made a formal announcement to said court, at the call of the calendar, that said case would be submitted on briefs, but performed no other services therein. The brief and argument on behalf of Shattuck, Hanninger and Marks upon which said Standard Quartz case was submitted to said Supreme Court, was prepared by Barnes, assisted by O'Connell.

13. After the granting of the motion for a re-hearing of the Triangle case and the dismissal of the appeal therein, Street & Alexander prepared the petition for allowance of the appeal, presented the same and obtained the allowance of the appeal, prepared the assignments or error, and statement of facts, prepared the bond on appeal, prepared the citation, and arranged and filed the same in the Supreme Court of Arizona and had a transcript of the
199 record transmitted to the Supreme Court of the United States, and took all the steps necessary to perfect such appeal. Except the argument of said motion for re-hearing and the preparation of the papers on appeal to the Supreme Court of the United States, and the perfecting of such appeal, Street & Alexander performed no services in connection with any of the suits hereinbefore mentioned.

14. The appeal taken by Costello in the Standard Quartz case was submitted to the Supreme Court of the Territory of Arizona and was taken under advisement by the Court. After the appeal to the Supreme Court of the United States in the Triangle case was perfected and while the appeal in the Standard Quartz case was under advisement by the Supreme Court of the Territory of Arizona, Costello and Shattuck, Hanninger and Marks made a compromise settlement and adjustment of their differences and entered into a written contract of settlement as follows:

"This agreement, made the 22nd day of January, A. D. 1904, between Martin Costello and Mary Costello, his wife, of Tombstone, Arizona, parties of the first part, and L. C. Shattuck, H. R. Hanninger and Emil Marks, of Bisbee, Arizona, parties of the second part, witnesseth:

The agreement then recites the pendency of the appeal to the Supreme Court of the United States and to the Supreme Court of the Territory of Arizona in the two suits above mentioned and the desire of the parties to settle the litigation and then provides that the parties of the first part, in case of signing of stipulations for the dismissal of said appeals, agree to convey to the parties of the second

part all their right, title and interest in the Roy and Lee
200 mining claims for the sum of $169,112.00 payable in certain instalments.

In consideration of which the parties of the second part agree that the appeals be dismissed.

The agreement further provides for the depositing of the deed in escrow to be delivered upon payment of the amount above mentioned, and contains provisions with respect to the application of the proceeds of ores extracted pending the completion of such payment.

The agreement was signed and acknowledged by all parties and was recorded in the office of the County Recorder of Cochise County.

15. Pursuant to this contract stipulations were made for the dismissal of the two appeals and the same were dismissed, and the contract of settlement was fully carried out.

16. Subsequently, Shattuck, Hanninger and Marks received as the proceeds of the litigation and the compromise and settlement thereof the sum of $75,000.00 which was paid in instalments. Of this amount one-fourth, or $18,750.00 was paid to O'Connell as the portion thereof to which Barnes and Martin and O'Connell were entitled under the agreement above mentioned. This amount was paid to O'Connell in instalments, $1250.00 being paid in June, 1904, $1250.00 being paid in June, 1905, and the balance about November 1st, 1906.

17. The co-partnership of Barnes and Martin continued until November 10, 1904. On that day Barnes died testate. By his will, Barnes devised and bequeathed all his property to his wife, Belle J. Barnes, the appellant. This will was subsequently probated
201 and in April, 1906, the estate was closed and the entire estate distributed to Mrs. Barnes. Subsequently and before the commencement of this action, Martin assigned his interest and that of the late firm in the contingent fee coming from said litigation, compromise and settlement to Mrs. Barnes.

That before his death, Judge Barnes went to Phœnix and notified Street & Alexander that a settlement was about to be effected in the Shattuck, Hanninger and Marks cases.

That in 1905, both Martin and Mrs. Barnes were advised and had knowledge of the claim of Street & Alexander to one-third of the contingent fee;

That Street & Alexander did not file any claim against the estate of Barnes for the reason that they considered that the estate of Barnes owed them nothing but that they had a one-third interest in the contingent fee itself.

18. That on October 23, 1907, Mrs. Barnes, as such devisee and assignee, brought this action against the defendants Shattuck, Hanninger and Marks for an accounting and to recover one-fourth of all moneys and properties received by Shattuck, Hanninger and Marks from said litigation and the compromise and settlement thereof, claiming that right thereto had vested in her under the distribution of the estate of Barnes and the assignment from Martin, and claiming that in addition to money, certain stocks had been received in settlement of the litigation, and praying for a decree requiring the

defendants to transfer and assign to her one-fourth of all stocks received by them.

202 19. The defendants answered, and while the suit was pending, Street & Alexander filed a complaint in intervention and obtained an order permitting them to intervene and to file their complaint in intervention, the complaint in intervention being drawn, signed and sworn to by Webster Street. By this complaint, they practically adopted Mrs. Barnes' complaint, alleged the agreement between themselves and Barnes and their right thereunder to one-third of the said contingent fee and prayed an accounting between all the parties to the action and that they be decreed one-third of all moneys, properties and stocks or whatever was paid or by right ought to be paid by Shattuck, Hanninger and Marks to said Barnes & Martin and O'Connell.

20. While the suit was in this condition, Webster Street died testate, and his will subsequently admitted to probate, and his widow, Mary E. Street, appointed executrix thereof; after her appointment as executrix, Mrs. Street, as executrix, was substituted as an intervenor in place of Webster Street, deceased, by order of the court; an amended complaint in intervention was thereupon filed, differing from the original complaint in intervention only in the addition of allegations made appropriate on account of the death of Street and the substitution of his executrix.

21. Prior to the commencement of this action and on June 17th, 1905, O'Connell paid to Martin, as surviving partner of the firm of Barnes & Martin, $1875.00 on account of the fee to be received by Barnes & Martin under the agreement therefor.

22. While the action was pending and after the filing and
203 service upon Mrs. Barnes and J. M. O'Connell of the original complaint in intervention, and while the cause was at issue but before trial and on April 23, 1909, O'Connell paid to Mrs. Barnes the sum of $10,625.00, which with the $1875.00 paid to Martin and the $6250, retained by O'Connell as his one-third, comprised the whole of the said contingent fee of $18,750, being one-fourth of all the moneys and property received by Shattuck, Hanninger and Marks from said litigation and the compromise and settlement thereof.

204 And the Supreme Court of the Territory of Arizona also makes and certifies the following statement of the rulings on the admission and rejection of evidence, which were excepted to by the plaintiff in the trial court, the appellant in said Supreme Court, to-wit:

When the case was called for trial, the plaintiff moved that the cause be dismissed as against the defendants, which motion was taken under advisement by the court and not passed upon except impliedly by the rendition of the judgment in the case. Thereupon, the plaintiff offered no evidence in support of the allegations of her complaint against the defendant. The intervenors thereupon offered evidence showing the copartnership of Barnes & Martin and Street & Alexander, in the practice of law, the bringing of the suits

against Costello, the agreement between Barnes & Martin and Shattuck, Hanninger and Marks with respect to the fee, the result of the trials of the Triangle and Standard Quartz cases, the appeals taken in those cases, the reversal of the judgment in the Triangle case and the filing of a motion for a re-hearing of that case, and the ground of that motion, the employment by Barnes of the firm of Street & Alexander to oppose the motion for re-hearing and to perfect an appeal to the Supreme Court of the United States, and the agreement made orally with respect to their compensation, the services performed by Street & Alexander, the performance of services by Street & Alexander, the settlement made between Costello and Shattuck, Hanninger and Marks, the receipt by Shattuck, Hanninger and Marks of $75,000.00 as the proceeds of such settlement,
205 and the payment by them to O'Connell of $18750.00, or one-fourth of the amount realized as the fee to be paid under the agreement with Barnes & Martin, and O'Connell, and the payment by O'Connell of $1875.00 of that amount to Martin and $10625 to Mrs. Barnes, all as stated in the foregoing findings of fact.

The intervenors also proved the death of Barnes on November 10, 1904, the probating of his will and the subsequent distribution of his entire estate to his wife, and also the death of Street, the probating of his will, and the appointment and qualification of Mrs. Street as executrix.

Thereupon, the intervenors offered to prove by O'Connell, who was being examined as a witness for the intervenors, that on April 23, 1909, the witness paid to Mrs. Barnes, the plaintiff, the sum of $10,625.00. The plaintiff, by her counsel, objected to the introduction of evidence on any payment made after the commencement of the action and after the filing of the complaint in intervention. The objection was overruled by the court and the plaintiff, by her counsel, excepted to such ruling.

Thereupon, the witness stated that he did make such payment at the time stated.

On cross-examination of the witness O'Connell by plaintiff's counsel, he testified that he negotiated the settlement with Costello. Thereupon, plaintiff's counsel asked the witness the following question:

"What, if anything, did Costello or his attorneys say in
206 these negotiations with respect to the "Triangle" appeal to the Supreme Court of the United States?"

Counsel for the intervenors thereupon objected to the question on the ground that it was incompetent and immaterial what Costello said. Counsel for the plaintiff urged that it was material to show that in making the settlement, Costello paid no attention to the Triangle case. It was in evidence that it concerned nothing but the construction of the Arizona Statute by the Supreme Court of the United States, and to prove that Costello in making the settlement allowed nothing for the matter in which Judge Street rendered any services. The court sustained the objection, to which ruling the plaintiff, by her counsel, excepted.

The intervenor Alexander, as a witness on behalf of the inter-

venors, offered to testify to certain conversation with Barnes, respecting the employment by Barnes of Street & Alexander and respecting the compensation of that firm. It had already been shown that Barnes was dead. Thereupon the plaintiff, by her counsel, objected to any conversations between the witness and the deceased, Barnes, because such evidence was prohibited by Paragraph 2536 of the Revised Statutes of Arizona, 1901, and that the witness was incompetent, under that statute, to testify to conversations with a deceased person. The objection was overruled by the court, and the plaintiff, by her counsel, excepted. Thereupon the witness was permitted to and did testify to such conversations.

John H. Martin was called as a witness for the plaintiff,
207 and testified that he was the surviving partner of the firm of Barnes & Martin. That the case known as the Standard Quartz case was tried in January, 1902, and resulted, on the 5th day of January, 1902, in a verdict for the plaintiff. That after that trial, Barnes went to Phœnix, and thence to New York. That both the Triangle and Standard Quartz cases were adverse claims against the Roy and Leo claims of Costello. That the testimony given at the trial of the Triangle case disclosed that the discovery monuments of the Roy and Leo claims were upon ground embraced within the limits of the Standard Quartz claim. That after the trial of the Standard Quartz case, the witness received the following telegram from Barnes: "I win Standard Quartz case with jury." That thereupon the witness sent to Barnes the following telegram: "Congratulate you. Great victory as wins all three cases."

The plaintiff then offered in evidence the last mentioned telegram, to the introduction of which the intervenors objected on the ground that it was a self-serving declaration, which objection was sustained by the Court, and the plaintiff, by her counsel, excepted.

All the above mentioned rulings upon the admission and rejection of evidence were assigned as error upon the appeal taken by the plaintiff to the Supreme Court of the Territory of Arizona from the judgment rendered against the plaintiff in the District Court, and were argued by counsel and considered by said Supreme Court, and were held by that Court to be not error.

208 And, now, on this Twelfth day of August, 1911, the above and foregoing statement of facts in the nature of a special verdict, and statement of the rulings of the court on the admission and rejection of evidence, is allowed, made and certified by the Supreme Court of the Territory of Arizona, and is ordered to be made a part of the record in this cause.

By the Court:

EDWARD M. DOE,
Associate Justice of the Supreme Court
of the Territory of Arizona.

200 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record in a certain cause lately pending in said court, No. 1169, wherein Belle J. Barnes was Appellant, and L. C. Shattuck, H. R. Hanninger and Emil Marks, Defendants, and Mary E. Street, Executrix, and J. L. B. Alexander, Intervenors, were Appellees, including the Judgment Roll, Exhibits, Supersedeas Bond on appeal from District Court, Reporter's Transcript of Testimony, Opinion, Judgment, Motion for Re-hearing, Petition for and Allowance of Appeal, Supersedeas and Cost Bond, Assignments of Errors, Statement of Facts, and all minute entries had and entered of record, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Citation and Order of Enlargement, are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 23rd day of August, A. D., 1911, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court.

210 In the Supreme Court of the United States.

BELLE J. BARNES, Appellant,
vs.
L. C. SHATTUCK, H. R. HANNINGER and EMIL MARKS, Defendants; J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, Deceased, Intervenors and Appellees.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the 11th day of July, 1911, pursuant to an appeal allowed and filed in the office of the Clerk of the Supreme Court of the Territory of Arizona, wherein Belle J. Barnes, L. H. Manning and Epes Randolph, are appellants, and you are appellees, to show cause, if any there be, why the judgment ren-

dered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 12th day of May, in the year of our — one thousand nine hundred and eleven.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

211 [Endorsed:] No. 1169. In the Supreme Court of the United States. Belle J. Barnes, L. H. Manning and Epes Randolph, Appellants, vs. J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, deceased, Appellees. Citation. Service of the within citation is hereby admitted this 16th day of May 1911. Alexander & Christy, Wm. M. Seabury, Attorneys for Appellees. Filed ——— —, 1911. ——— ———, Clerk. Filed May 16, 1911. F. A. Tritle, Jr., Clerk.

212 In the Supreme Court of the United States.

BELLE J. BARNES, L. H. MANNING, and EPES RANDOLPH, Appellants,
vs.
L. C. SHATTUCK, R. H. HANNINGER, and EMIL MARKS, Defendants; J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, Deceased, Intervenors and Appellees.

Order Enlarging Time.

And, now, on this 3rd day of July, A. D. 1911, good cause being shown therefor, on motion of Eugene S. Ives Esq., counsel for the appellants, it is

Ordered, that the time in which to docket this cause and to file a transcript of the record and proceedings therein in the Supreme Court of the United States, be and the same is hereby enlarged and extended until the 1st day of September A. D. 1911, and that the return day of the citation heretofore issued herein be and is hereby enlarged and extended to September 1st A. D. 1911.

JOHN H. CAMPBELL,
Associate Justice of the Supreme Court of the Territory of Arizona.

213 [Endorsed:] No. 1169. In the Supreme Court of the United States. Belle J. Barnes, L. H. Manning and Epes Randolph, Appellants, vs. L. C. Shattuck and others Defendants; J. L. B. Alexander and Mary E. Street, executrix of Webster Street, deceased, Intervenors and Appellees. Order enlarging time to file transcript of record. Filed July 5, 1911. F. A. Tritle, Jr., Clerk.

Endorsed on cover: File No. 22,894. Arizona Territory Supreme Court. Term No. 445. Belle J. Barnes, L. H. Manning, and Epes Randolph, appellants, vs. J. L. B. Alexander and Mary E. Street, executrix of Webster Street, deceased. Filed October 9th, 1911. File No. 22,894.

SUPREME COURT

OF THE

UNITED STATES

Belle J. Barnes, L. H. Manning and Epes Randolph,

Appellants.

vs.

J. L. B. Alexander and Mary E. Street, Executrix of Webster Street, Deceased.

Appellees,

No. 445.

APPELLANTS' BRIEF.

Statement of Facts.

In the year 1901, and prior thereto, until his death in November, 1904, William H. Barnes was an attorney-at-law engaged in the practice of his profession in the courts of Arizona, and associated in the practice with one John H. Martin under the partnership name of Barnes & Martin. From some time in 1902 until September 1st, 1907, Webster Street and J. L. B. Alexander were practicing attorneys at Phoenix, Arizona, and partners under the firm name of Street & Alexander.

In 1901, Martin Costello, claiming to be the owner of the "Roy" and "Leo" mining claims, in the Warren Mining

District, made application to the proper land office for a patent to those claims. The defendants, Shattuck, Hanninger and Marks, were the owners of the "Standard Quartz," "Triangle" and "Iron Prince" mining claims which conflicted with the "Roy" and "Leo" claims of Costello. During the pendency of Costello's application, defendants employed the firm of Barnes & Martin to file an adverse claim against the application for patent of the "Roy" and "Leo" claims, on account of the conflict with the "Standard Quartz" and the "Triangle" and "Iron Prince" claims. These adverses were filed and subsequently suits were brought in the district court of Cochise County in support of them against Costello. In the prosecution of these suits, Barnes and Martin associated with them J. M. O'Connell, an attorney residing at Bisbee. While these suits were pending, an agreement was made between Barnes and Martin and O'Connell on the one hand, and Shattuck, Hanninger and Marks on the other by the terms of which these attorneys were to receive as their compensation one-fourth of all money or properties received by said defendants as the result of such litigation, or, by way of settlement or compromsie. (Amended Complaint in Intervention, Par. V, fol. 25; Complaint, Par. IV, fol. 6). The "Triangle" case was subsequently tried and judgment rendered in favor of Costello. From this judgment an appeal was taken to the Supreme Court of the Territory, and on March 18th, 1902, judgment was reversed. Subsequently Costello filed a motion for rehearing, and on March 30th, 1903, the appeal was dismissed for want of jurisdiction, for the reason that the appeal bond was not filed within the time required by law. (See Shattuck v. Costello, 8 Arizona, 22; 8 Arizona, 255.) In the meantime, the "Standard Quartz" case was tried, resulting in a

judgment in favor of Shattuck, Hanninger and Marks, and from this judgment Costello prosecuted an appeal to the Supreme Court of the Territory. What disposition was made of the "Iron Prince" case is not disclosed by the record.

The interveners allege that after the filing of the motion for rehearing in the "Triangle" case and in the latter part of January, 1903, Judge Barnes, while in Phoenix, called upon the firm of Street & Alexander and engaged their services to oppose the motion for rehearing, and in the event of an adverse decision to perfect an appeal to the Supreme Court of the United States. For these services the intervenors claim that Judge Barnes agreed to give them one-third of the contingent fee which he might receive, not only from the "Triangle," but also from the "Standard Quartz" case. That the agreement was oral, and the actual language used by Judge Barnes, as testified to by Mr. Alexander, was: "Now, I want you to attend to this case ("Triangle" case); I have to go back to New York. Now, if you will attend to this case, I will give you one-third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third." (Abstract, page 45, folio 135.) That Street & Alexander accepted this employment, and Judge Street argued the motion for rehearing, and after the granting of that motion and the dismissal of the appeal, prepared the necessary papers and perfected an appeal to the Supreme Court of the United States.

Mrs. Barnes denies that Barnes made any contract of employment whatever with Street & Alexander; her theory being that the slight service performed by Judge Street was an act of courtesy, and rendered without expectation of compensation,as is not infrequent between brother lawyers.

The contract alleged by the interveners is that while Barnes prepared the adverses, commenced the two suits, examined the law and the facts, prepared for trial, tried the Triangle case, lost it, appealed to the Supreme Court, briefed and argued the appeal and won it; tried the Standard Quartz case before a jury and won it, all prior to Street having had anything whatever to do with the case, he, nevertheless, agreed to give Street & Alexander one-third of the entire fee, being the same amount as Barnes & Martin themselves were to retain (O'Connell being entitled to the ramaining one-third) in consideration of Street & Alexander opposing the motion for a rehearing and to dismiss the appeal; and upon the granting of such motion, which was inevitable, preparing the appeal papers to the United States Supreme Court. It appears that there was no thought of prosecuting the appeal in that court. It was manifestly hopeless and was taken for the sole purpose to keep the entire matter in litigation and thus by preventing a sale by Costello, force a settlement. For this inconsequential work it is claimed Barnes agreed to give them as much of the fee as he himself was to receive. The only proof of the contract was the testimony of Alexander, Barnes being dead.

While the motion for rehearing was pending, the appeal in the "Standard Quartz" case taken by Costello was also pending in the Supreme Court of the Territory, and was submitted at the January, 1903, term of that court. The brief in that case was prepared by Judge Barnes with the assistance of Mr. O'Connell, Street and Alexander performed no service in that case, except that at the request of Judge Barnes, Judge Street made formal announcement to the Supreme Court upon the call of the calendar that the case would be submitted on briefs. After the appeal to the Supreme Court of the United States in the "Triangle" case,

and while the appeal in the "Standard Quartz" case was under advisement, the parties made a settlement of their differences and entered into a written contract, found on pages 19 to 22, abstract of record. Pursuant to this contract stipulations were made for the dismissal of the appeals in the two cases, and the contract of settlement was carried out. Subsequently, Shattuck, Marks and Hanninger received as the proceeds of the litigation the sum of $75,000, which was paid in installments. Of this one-fourth, or $18,750, was paid to Mr. O'Connell as the fee to which Barnes & Martin and O'Connell were entitled under the agreement above stated. Payments of this fee were also made in installments: $1,250 being paid to Mr. O'Connell in June, 1905, and the balance about November 1st, 1906. (Finding XVI, Record, page 103.)

Judge Barnes died November 10th, 1904. The partnership between himself and Martin continued up to that time. By his will, Judge Barnes devised and bequeathed all his estate to his wife, the appellant. His will was subsequently probated, and in April, 1906, the estate was closed and the entire estate distributed to Mrs. Barnes. Subsequently Martin assigned his interest and that of the late firm in the fee due from Shattuck, Hanninger and Marks, to Mrs. Barnes.

She, claiming that a portion of the property realized by those parties consisted of stocks of considerable value, on October 23rd, 1907, brought this action for an accounting and a recovery of one-fourth of the amount received by the defendants, whether in money or stocks. The defendants answered, and while the cause was pending and at issue, Street and Alexander filed their complaint in intervention, having obtained an ex parte order permitting its filing. By this complaint they practically adopted the allegations of Mrs. Barnes' complaint, alleged the agreement between

themselves and Barnes & Martin, and prayed an accounting, substantially as asked by Mrs. Barnes. Upon the death of Judge Street, while this action was pending, Mary E. Street, his executrix, was substituted as intervenor and an amended complaint in intervention filed, making appropriate allegations of the death of Judge Street and the appointment of his personal representative.

To this complaint in intervention, both the plaintiff and the defendants demurred. The demurrer of the plaintiff was upon the ground that the facts stated did not constitute a ground of intervention, or a cause of action against the defendants, or any right on the part of the plaintiff to any relief whatever. The demurrers having been overruled, both parties urged that the evidence, as well as the pleading, was insufficient to show that the intervenors had such an interest in the subject matter of the litigation as to entitle them to intervene, or to any relief. Prior to the commencement of this action and on June 17th, 1905, O'Connell paid to John H. Martin, the surviving partner of the firm of Barnes & Martin, $1,875 on account of the amount due Barnes & Martin.

While the action was pending, and after the filing of the original complaint in intervention, Mr. O'Connell paid Mrs. Barnes the sum of $10,625. Testimony to this effect was received over plaintiff's objection that no evidence as to transactions subsequent to the commencement of the action was admissible.

At the trial the plaintiff, by her counsel, sought to dismiss the action against the defendants. This application was taken under advisement by the court and does not appear to have been passed upon. The plaintiff declined to introduce any evidence in the first instance, and thereupon the intervenors introduced evidence in support of their claim, the plaintiff introduced evidence in rebuttal, and the cause

was submitted to the court. On April 27th, 1910, the court gave judgment for the intervenors against the plaintiff for $6,250 and interest and costs. This sum is one-third of the entire $18,750, or one-half of the total amount paid to Mrs. Barnes and to Martin; although it is not claimed that Mrs. Barnes received any portion of the $1,875 paid to Martin.

The cause was tried before the court without a jury. The plaintiff made a motion for new trial (R. 19), which was denied, and from the judgment and order denying a new trial the plaintiff appealed to the Supreme Court of the Territory of Arizona. There the judgment of the trial court was affirmed (page 92); and that court, in accordance with the Arizona practice, entered judgment against appellants Randolph and Manning, sureties on the appeal and supersedeas bond of the appellant in that court. Thereupon a motion for rehearing was made, which was denied (page 93), and the appellants perfected their appeal to this court. The Supreme Court of Arizona made findings of fact (page 99), which are in substance as stated herein.

Statement of Appellants' Contention.

It will be observed that the judgment from which the appeal is taken is that the intervenors recover of the appellant Mrs. Barnes the sum of $6,250.00.

At the time this action was commenced Mrs. Barnes had received no money whatever from the defendants, whose agreement to pay Barnes & Martin one-fourth of their recovery comprised the foundation of the cause of action of the intervenors, as well as of the plaintiff.

In order, therefore, that the judgment be sustained, the intervenors must establish:

First: That they had an equitable assignment of, or an equitable lien upon, the fee agreed to be paid by the defendants to the firm of Barnes & Martin; and

Second: That they are entitled to a judgment against Mrs. Barnes by reason of her having come into the possession of the fund in which they owned an interest.

Appellants contend:

First: That there is no allegation in the amended complaint in intervention, and no finding in the statement of facts made by the Territorial Supreme Court to sustain the legal conclusion that an equitable assignment or equitable lien existed in favor of Street & Alexander; and

Second: That even if the equitable lien be established, there is no allegation or finding sufficient to sustain a judgment in favor of the intervenors against Mrs. Barnes or against anyone other than the defendants in the action.

It is true that long subsequent to the commencement of the action, the defendants paid to Mrs. Barnes $10,625, being, together with $1,875 which had theretofore been paid to Martin, the junior member of the firm of Barnes &

Martin, two-thirds of the $18,750.00, the total fee due by the defendants to Barnes & Martin and O'Connell.

The appellants, however, contend that there is no allegation in the complaint in intervention that Mrs. Barnes received any of this money, and therefore, no allegation to sustain the money judgment against her; and they further contend that the finding that such payment was made to Mrs. Barnes by the defendants, is based upon evidence improperly admitted; because in the absence of any allegation in the complaint in intervention, or of a supplemental or amended complaint, it was improper for the trial court to admit, as it did over the objection of counsel for the plaintiff, evidence of a payment made long subsequent to the commencement of the action.

Counsel for appellants deem it advisable to supplement the Assignments of Error heretofore filed by the following:

ASSIGNMENTS AND SPECIFICATIONS OF ERROR.

The Supreme Court of the Territory of Arizona erred in not sustaining the first assignment of error made by appellant Barnes upon appeal to said Supreme Court, which said assignment of error is as follows:

"The court erred in overruling the demurrer of the plaintiff to amended complaint in intervention, upon the ground that the facts stated therein do not constitute a ground for intervention, for the reason that it appears upon the face of said complaint in intervention that the intervenors were not the owners of and did not have any lien upon any part of the claim or demand sued upon by the plaintiff, and that the said amended complaint in intervention does not show facts which would amount to an assignment either legal or equitable of any portion of said claim or demand, but merely shows that the intervenors were merely creditors of the late firm of Barnes & Martin," and in not reversing

the judgment appealed from on account of said error, and in holding that in the ruling of the district court therein complained of there was no error.

IA.

The Supreme Court of Arizona erred in rendering judgment for the intervenors and against the appellants upon the statement of facts, for the reason that it appears therefrom as a matter of law:

(a) That the intervenors had no interest in the subject matter of the litigation in which they sought to intervene;

(b) That the contract between Barnes & Martin and Street & Alexander does not amount to an equitable assignment, and creates no equitable interest or ownership in the intervenors;

(c) That the interveners' claim was a personal one against the partnership of Barnes & Martin.

IB.

The Supreme Court of Arizona erred in rendering judgment for the interveners and against the appellants, for the reason that as a matter of law the statement of facts by said court do not support said judgment, nor any judgment except a judgment for the appellant Barnes.

IC.

The Supreme Court of Arizona erred in rendering judgment for the interveners and against the appellants, for the reason that the statement of facts by said court does not support the allegations of the amended complaint in intervention, and depart therefrom, and because the said amended complaint in intervention does not state facts sufficient to constitute a cause of action.

II.

The Supreme Court of Arizona erred in holding that the said District Court did not err in admitting evidence of any payment made to the plaintiff after the commencement of this action, and after the filing of the complaint in intervention, for the following reasons:

(a) Because the amended complaint in intervention did not state facts sufficient to entitle the interveners to intervene, for the reasons stated in the first assignment of error.

(b) Because evidence of any such payment was not within the issues tendered by the pleadings, and was not in any manner pleaded by the interveners, and that there was no pleading, supplemental or otherwise, upon which to base such evidence.

(c) Because proof of such payment was entirely immaterial, and could not give interveners a right to recover a judgment, the sole right of the interveners being to enforce the collection of their claim against the surviving partner of the firm of Barnes and Martin.

(d) Because the money, if paid to the plaintiff, did not constitute a specific fund which the interveners might trace and follow into whose hands it may have come (page 48, folio 90).

And in holding that in the ruling therein complained of there was no error.

III.

The Supreme Court of the Territory of Arizona erred in not sustaining the fourth assignment of error made by the said appellant Belle J. Barnes, as follows:

"The court erred in sustaining the interveners' objection to the following question:

"What, if anything, did Costello or his attorneys say in these negotiations with respect to the "Triangle" appeal to the Supreme Court of the United States (page 55, folio 105) for the reason that it clearly appeared from the evidence that there was no merit in the appeal taken in the "Triangle" case to the Supreme Court of the Pnited States, and was taken merely for the purpose of delay, and that proof as to what was said by Costello and his attorneys in making the settlement with reference to such appeal, and to what extent the said appeal was considered in making such settlement, has a material bearing upon the reasonableness or probability of the contract testified to by the intervenor Alexander as having been made;" and in holding that in the ruling complained of there was no error.

IV.

The Supreme Court of Arizona erred in not sustaining the sixth assignment by said appellant Barnes upon the appeal to that court, as follows: "The court erred in sustaining interveners' objection to the introduction of the telegram, Exhibit 3, for the reason that the said telegram was competent and admissible as bearing upon the reasonableness or probability of Judge Barnes having made the alleged agreement with Street & Alexander as testified to by the witness Alexander," said telegram being as follows: "Congratulate you great victory as wins all three cases." (Page 23, Exhibit 3), for the reason that said telegram was competent and relevant and admissible, as stated in said assignment, and in holding that in the ruling complained of there was no error.

V.

The Supreme Court of Arizona erred in affirming the judgment of the District Court therein appealed from, for

the reason that said District Court erred in rendering judgment in favor of the intervenors and against the appellant Barnes for the following reasons:

(a) Because the amended complaint in intervention was insufficient to entitle the interveners to intervene, or to entitle them to any relief against the plaintiff, for the reasons stated in the first assignment of error.

(b) Because the judgment was excessive, in that it included a portion of the moneys paid by O'Connell to Martin, and it was not shown that any portion of the money paid to Martin was ever received by the plaintiff."

VI.

The Supreme Court of Arizona erred in holding and ruling that the facts stated in the amended complaint in intervention were insufficient to entitle the interveners to relief against the plaintiff, and in overruling the assignments of error with respect thereto, and in not reversing the said judgment so appealed from, because the said amended complaint in intervention did not state facts entitling the interveners to any relief or judgment against the plaintiff.

VII.

The Supreme Court of Arizona erred in not reversing the judgment of said District Court, and in rendering judgment upon the statement of facts, for the reason that it appeared, and is so stated in the statement of facts, that the sum of $1,875 had been paid to John H. Martin, as surviving partner of the firm of Barnes & Martin, and that no part of the same had been received by the said Belle J. Barnes, and that the said Belle J. Barnes could in no event, upon said statement of facts, be held liable for more than

one-half the amount she actually received, and it clearly appeared that the judgment was excessive to the extent of one-half of said sum of $1,875. (Findings 21 and 22, page 104.)

VIII.

The Supreme Court of Arizona erred in not modifying the judgment appealed from by deducting therefrom one-half of said sum of $1,875, or requiring the remission thereof as a condition for affirming said judgment, and in sustaining the action of the District Court in rendering judgment for the full amount claimed, for the reasons stated in the last preceding assignment of error.

IX.

There is error also in this: That judgment was given against said appellants, whereas by the law of the land the said judgment ought to have been given for the said appellants and against the said appellees.

Argument.

I.

The amended complaint in intervention does not state facts showing that the intervenors had an interest in the subject matter of the suit, which might be affected by the judgment.

(This heading covers Assignmnet I, paragraph (a) of Assignment VII, Assignment VII, and I-C of Specifications of Error, in this Brief.)

The right of the intervenors to intervene in this action is based by the Supreme Court of Arizona on the proposition of law that Street & Alexander were part owners of the contingent fee for the recovery of which the plaintiff instituted this suit. This ownership must appear from the amended complaint in intervention. Par. 1279, Revised Statutes of Arizona, 1901.

The court says: "As to the sufficiency of the allegations of the petition to constitute a cause of action, we are of opinion that it sufficiently sets forth facts which indicate an intention to make the fund a security for the debt, and brings the pleading within the holding of the Supreme Court of the United States in the cases of Walker vs. Brown, 165 U. S., 654, and Ingersoll vs. Coram, 211 U. S., 355."

The intervenors based their claim of ownership on the contract between Barnes & Martin and Street & Alexander, contending successfully that the contract as alleged amounted to an equitable assignment of one-third of the contingent fee for the recovery of which the plaintiff instituted her suit. It cannot therefore be disputed that unless such contract did amount to an equitable assignment, which is what the court necessarily means when it says "it sufficiently sets forth facts which indicate an intention to make

the fund security for the debt," the intervenors' complaint showed no interest in the subject matter of the suit such as would entitle them either to intervene, or to a judgment against the appellant Barnes.

That the Supreme Court was correct in holding that unless the facts alleged amounted to an equitable assignment, the intervenors cannot recover, is clear from the authorities.

Horn vs. Volcano Water Company, 13 Cal., 62 at 70.
Yetzer vs. Young, 3 S. D., 263; 52 N. W., 1054.
Lewis vs. Harwood, 28 Minn., 428; 10 N. W., 586.
McClurg vs. State Bindery Co., 3 S. D., 362; 53 N. W., 428.
Chapman vs. Forbes 123 N. Y., 532; 26 N. E., 3.

Accepting, then, without further discussion, this construction of the court as correct, we pass to the question important in this consideration:

Does the complaint in intervention show such an equitable assignment?

The only portion of the complaint in intervention which can be claimed to bear upon this question is Paragraph IX (Transcript, page 10). Summarized, this paragraph alleges that Barnes & Martin and O'Connell employed Street & Alexander to help them in the prosecution and defence of certain litigation, and "promised them that they, the said Street & Alexander, should share with them their said fee and *promised* them one-third thereof. That is to say, the firm of Barnes & Martin should receive one-third of said fee, the said J. M. O'Connell should receive one-third of said fee and the firm of Street & Alexander should receive one-third of said fee, which said proffer was accepted by the said Street & Alexander, and the said Street & Alex-

under did so lend their services and help in the prosecution and defense of said case for the price of one-third which they, the said Barnes & Martin and the said J. M. O'Connell, *should receive and have paid to them as a fee in such matter.*"

Paragraph X is as follows: "That by reason of the contract of employment aforesaid with the defendants, the said Barnes & Martin and the said J. M. O'Connell became and were entitled to one-fourth of said moneys and stocks so received by the said defendants as the proceeds of such settlement and adjustment, and of their interest in the said property, paying and delivering to said Street & Alexander their portion, being the one-third of said one-fourth."

These allegations fall short of showing an equitable assignment of any portion of this fee to Street & Alexander. There is no direct allegation that one-third of the fee was assigned or agreed to be assigned. There is nothing stated from which the inference might be drawn that it was intended to assign to or vest title in any portion of the fee in Street & Alexander. There is no allegation that Street & Alexander were to receive their portion of the fee from the defendants, or that Barnes & Martin surrendered to them control of any portion of the fee. On the contrary, the complaint in intervention in terms negatives any such idea.

The above quoted word "promised them that they (Street & Alexander) should share with them their said fee, and promised them one-third thereof," repel the notion of an assignment, either legal or equitable.

As will hereafter appear, the test of an assignment, legal or equitable, is the right of the assignee to bring a direct action against the primary debtor to recover the interest claimed by him to have been assigned.

A promise to make an assignment does not create in the assignee that interest which would enable him to bring his action against the primary debtor. Such a promise might be the foundation of an action against the promisor to compel him to specifically perform his promise and make the assignment, but such an action could only be maintained upon allegation and proof of facts to the effect that the plaintiff did not have an adequate remedy at law, as, for instance, in this case, the insolvency of Barnes & Martin. A primary debtor might be joined in such an action, but his obligation to the assignee would not exist until the plaintiff had prevailed by proof of such facts as would be necessary to sustain a judgment for specific performance. We submit, therefore, that the allegations that Barnes did no more than promise, restricts the intervenors to a recovery against Barnes & Martin in a personal action upon contract.

The last words of Paragraph IX, "the said Barnes & Martin and the said O'Connell should receive and have paid to them as a fee in such matter," are also conclusive against the theory of an equitable assignment.

The oft quoted language of Mr. Justice Swayne, as to what is necessary to constitute an equitable assignment, is peculiarly applicable:

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution is indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character

that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor."

Christmas vs. Russell, 14 Wall, 69, at page 84.

In the case of Dillon vs. Barnard, 21 Wallace, 430, the question before the court was the effect of a provision of a railroad mortgage given to secure an issue of bonds, which provision provided that the expenditure of all moneys realized from the sale of bonds should be approved by one of the trustees under the mortgage before such expenditure should become a charge upon such funds. Mr. Justice Field, delivering the opinion of the court, said:

"The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence, where the expectation of a contractor that funds from his employer, derived from specific sources, will be devoted to the payment of his services or materials, is disappointed. Such expectations, however reasonable, founded upon the express promise of the employer that the funds shall be thus devoted, of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer, depriving himself of the control of the funds and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials are furnished. There must be a relinquishment by the employer of the right of dominion over the funds, so that without his aid or conseent the contractor can enforce their application to his payment when his contract is completed. In the case at bar there is no circumstance imparing the dominion of the corporation over the funds received from the bonds; there is only its covenant

with the trustees that the expenditure of those funds shall be made with the approval of one of them, and that one of them shall give his written assent to its contracts before they are paid out of such funds * * * No right, therefore, exists in him to pursue such funds into other property upon which they have been expended. The case, as already intimated, is on his part one of simple expectation, against which misfortune equity furnishes no relief." (Page 440.)

The case of Trist vs. Child, 21 Wall, 441, would seem to be decisive. In that case Trist had a claim against the United States. He employed Child to present his claim to Congress and to secure an act directing its payment. It was agreed that for his services in that behalf Child should receive 25 per cent of whatever amount might be allowed by Congress. Congress subsequently appropriated a sum of money for the payment of the claim. Child demanded his 25 per cent, and upon payment being refused, brought his suit in equity to restrain the payment of the money to Trist, and to compel the payment of 25 per cent to him, claiming that the agreement between himself and Trist amounted to an equitable assignment of the 25 per cent and gave him a lien on the funds for that amount. It was held that such agreement did not amount to an equitable assignment and gave Child no lien on the fund. The court said:

"It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. A part of a particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund

pro tanto, either by giving an order or by transferring it otherwise in such a manner that the *holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor.*" (The italics are ours.)

In Smedley vs. Speckman, 157 Fed., 815 (at page 819), it is said:

"A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity. To make an equitable assignment, there should be such an actual or constructive appropriation of the subject matter as to confer a complete and present right meant to be provided for, even where the circumstances do not admit of its immediate exercise. If the holder of the fund retain control over it, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor."

In Canty vs. Latterner, 31 Minn. 239, 17 N. W. 385, an agreement was made between attorney and client that the attorney should receive a specified fee out of the moneys to be paid by a railroad company for taking property for railroad purposes. The agreement provided that the attorney should receive the amount agreed upon from the railroad company out of the amount to be paid. It was held that this peculiar provision made the agreement upon its face an equitable assignment, but the court carefully distinguishes the case from the ordinary agreement to pay out of the fund, and bases its decision upon the provision that the plaintiff *was to receive the money from the railroad company*, saying:

"It (the agreement) expresses not merely an obligation to pay upon the contingency named, nor merely to pay out

of money to be collected by the respondent, but that the plaintiff should receive this money *from the railroad company* out of the amount owing by it to the respondent. It was in effect a constructive appropriation in favor of the plaintiff of so much money payable to the respondent, subject only to the condition named, and was hence operative as an assignment, though not an assignment in form. A distinction exists between such a case and an agreement that the promisor will pay out of a particular fund. In the latter case the agreement contemplates continued right in the promisor to recover and to hold the money, and that payment shall be made only through him." (Italics are the court's.)

In Silent Friend Mining company vs. Abbott, 7 Colo. App. 76, 42 Pac. 318, it was held that an agreement to pay a debt out of the proceeds of ore to be mined was not an equitable assignment. The court cited the cases in 14 and 21 Wall, above cited, and discussing the distinction laid down in Canty vs. Latterner, said:

In Canty vs. Latterner, 31 Minn. 239, 17 N. W. 385, the contract was that Latterner should pay Canty a specified sum of money for his services as attorney for Latterner in a suit then pending, and agreed that Canty should receive the money from the Minneapolis & St. Louis Railroad, out of an amount due Latterner from the railroad, to be paid when the suit was settled. The court construed the contract as an equitable assignment, and based its decision upon the ground that the money was to go directly from the railroad to Canty, and was not to be first collected by him, and then paid to Latterner; and in order that its decision upon the facts before it might not be misunderstood, the court added: "A distinction exists between such a case and an agreement that the promisor will pay out of a

particular fund. In the latter case the agreement contemplates a continued right in the promisor to recover and hold the money, and that payment should be made only through him." (Page 320.)

Professor Pomeroy, in a note to the statement of the doctrine of equitable assignment, after stating that the English rule is that a mere agreement to pay out of a particular fund is an equitable assignment, continues:

"The American courts do not generally accept this doctrine. They require a *present appropriation,* by order or otherwise, of a fund, whether existing or in the future; a mere promise or executory agreement to apply or appropriate a fund does not, under the American rule, amount to an equitable assignment."

In Kelley vs. Newman, 79 Ill. App., 285, a claim was placed in the hands of an attorney for collection, under an agreement to pay the attorney thirty per cent for collecting it. It was held that the agreement was a mere promise to pay, and not an assignment, and the fact that the client had agreed to pay the attorney thirty per cent of the claim does not give the attorney a sufficient interest in the claim to entitle him to intervene personally in a chancery proceeding concerning it.

3 Pom. Eq. Jurisprudence, pages 2567-8, Note 1.

In its last analysis the question whether a contract does or does not constitute an equitable assignment is a mere matter of common sense ascertainment of the intent of the contracting parties.

If it is obvious from the agreement that the party to be paid with the fund was to be secured for the part to be paid, then the inference of an equitable assignment would follow.

If the employer be insolvent or entirely without resources, and this should appear from the agreement, there would be

a tendency on the part of the court to imply from its terms the natural conclusion that the party to be paid was to be secured by his proportion of the fund. It is entirely a question of the intent of the parties, and, as stated in the opinions quoted above, the precise phraseology is immaterial, provided the intent may be gathered from the terms of the agreement. There is no suggestion that the question of security was either contemplated or considered by either party.

The court cites the case of Ingersoll against Coram, 211 U. S., 365.

We regard such case as strongly illustrative of our contention.

The contract between Ingersoll and Coram consisted in correspondence. Ingersoll concluded his letter as follows:

"We can raise money enough to pay expenses, and, of course, I shall want expenses, but the real question is as to what I am to have in sace of success, and *how that is to be secured.* (The italics are ours.)

In reply to such letter Root and Coram wrote Ingersoll agreeing to pay him $100,000, and added:

"There is to be no personal obligation against J. A. Coram in the event that the interests represented by Henry A. Root are unsuccessful, and *in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured," etc.* (The italics are ours.)

It appears from this correspondence that there was no personal obligation on the part of Coram whatever; while in our case there was a personal obligation on the part of Barnes to pay Street & Alexander. Said personal obligation on the part of Barnes, it is true, only accrued in the event that the litigation in behalf of Marks and Hanninger should be successful. If unsuccessful, Barnes and Street

& Alexander were all working without compensation, but if successful, then Barnes was to get his fee; and in such event there did accrue a personal obligation on the part of Barnes & Martin to pay Street & Alexander.

In the Ingersoll case, however, not only was Coram exempt from a personal obligation in the event of an unsuccessful issue of the suit, but it was further provided that "in no event," that is to say, not even in the event the suit should be successful, should Coram be obligated to pay except out of the funds secured.

This absolute failure of personal obligation on the part of Coram in any conceivable event precluded anything in the nature of a promise to pay, and left, therefore, to Ingersoll, necessarily an interest in the property should there be a recovery, or nothing at all. The court therefore was constrained to find that the intention of the parties was to make an equitable assignment to Ingersoll to the extent of the stipulated fee.

In its opinion the court approved Christ vs. Child, and Wright vs. Ellison, and found that the facts in Ingersoll vs. Coram were essentially different from the facts in such cases.

In Walker against Brown, 165 U. S., 654, the court approves the following from Pomeroy on Equity Jurisprudence:

"The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party successfully indicates an intention to make some particular property, real or personal, or fund therein described or identified, security for a debt or other obligation, creates an equitable lien upon the property so indicated."

We respectfully submit that this language is in entire harmony with the principle as contended for by us, and that there is not a word of allegation in the complaint in intervention to the effect that Barnes & Martin were assigning or transferring their fee or any portion of it as a security to Street & Alexander.

Recurring again to the allegations of the complaint in intervention, it will be seen that it contains none of the matters which would take it out of the rule established by the above authorities. No assignment is directly alleged. It is not alleged that any order or direction was given to the defendants to pay to Street & Alexander, nor that any notice was given to them of the alleged agreement. The power of collection was not surrendered by Barnes & Martin. Indeed, the affirmative allegation of the complaint is, in effect, as heretofore quoted, that collection was to be made by Barnes & Martin and O'Connell, and one-third was to be paid over by them to Street & Alexander. The complaint in intervention shows, to use the language of the court in Canty vs. Latterner, *supra*, that the agreement contemplated a continued right in Barnes & Martin and O'Connell to collect and receive the fee, and that payment should be made to Street & Alexander through them. Hence there was no equitable assignment. Street & Alexander had only the personal agreement of Barnes & Martin and O'Connell to pay one-third of the fee, and for a breach of this agreement they had the ordinary remedies against those parties, but, at most, they were no more than creditors of Barnes & Martin, and no more entitled to recover in this action than any other person to whom Barnes & Martin and O'Connell might chance to be indebted.

If the intervenors had intended to rely upon an equitable assignment, they should have pleaded it in clear and un-

equivocal language. They should have alleged either that the one-third of the one-fourth was assigned, or at least that it was the intention of the parties that Street & Alexander were to have a direct interest therein as security for their compensation.

It is insisted, therefore, that the amended complaint in intervention shows no such interest in the intervenors in the subject matter of this action as would entitle them to recover, and the demurrer should have been sustained.

II.

The statement of facts by the Supreme Court of Arizona does not support the conclusion of that court that the intervenors were the owners of any interest in the subject matter of the suit.

(This heading covers Assignment X and Specifications 1-A and 1-B.)

It has been urged that the amended complaint in intervention does not state facts sufficient to show an interest in the subject matter of the suit. Such an interest could only be acquired by an assignment, legal or equitable, of the portion of the fee claimed by Street & Alexander. The rules of law as to what constitutes such an assignment have already been stated and the cases considered. The result of such authorities may be summarized:

To constitute an equitable assignment or an equitable lien there must be an intent to appropriate a part of the fund and to make the assignee or lien claimant the owner of the fund *pro tanto*. So much is clearly held in the Ingersoll case, and is plainly stated by the court, but it is held that the particular contract under consideration in that case complied with these requirements.

From all the decisions of the United States Supreme Court the following rules may be deduced:

1. That a mere agreement to pay an attorney a portion of the recovery in a given case, unaccompnaied by other facts or circumstances showing a further intent, does not amount to an equitable assignment, or create a lien in favor of the attorney.

2. That when the contract or the circumstances show an intent to vest in the attorney title to a portion of the fund, or to give him a lien, such assignment or lien will be held to exist.

The finding of the court with respect to the contract between Barnes & Martin and Street & Alexander is number 11, appearing on page 101, folio 196 and 197 of the Transcript. The findings set forth the contract as having been made in the following language used by Judge Barnes to Street & Alexander:

> "Now I want you to attend to this case (referring to the Triangle case). I have to go back to New York. Now, if you will attend to this case, if you will agree to attend to this case, I will give you a one-third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third."

Considering this finding in the light of all the other findings of the Supreme Court of Arizona, the question arises whether the language quoted, and its acceptance, amounts to an equitable assignment, or whether it means anything more than a promise to pay over to Street & Alexander one-third of the fee which Barnes & Martin were to receive.

The language is, "I will give you one-third of the fee which I have coming to me." This language is no stronger, and in fact, has no different meaning than if Barnes had said, "I will pay you one-third out of the contingent fee I have coming to me." It can make no difference that the word "give" was used instead of the word "pay." In ordinary conversation they are used synonymously, and obviously were so used here.

There is nothing in this evidence which justifies the inference that there was any intent on the part of either Street or Barnes to make an assignment of one-third of the fee. No words of assignment were used. No order on the defendants or direction to pay Street & Alexander was given. It does not seem to have occurred to either of them to even notify the defendants, and no such notice was given for about two years. There was nothing in the language testified to have been used by Barnes to indicate any surrender of control over a right to collect the fee, or any intent that Street & Alexander should receive their portion of the fee directly from the defendants. Still less is there anything to justify the conclusion that Barnes intended absolutely to transfer the one-third in such a manner that he could no longer control it or forbid its payment to any one but his firm.

It is of course true that no precise form of language is necessary to make an equitable assignment, and that it makes no difference what language is used, provided the intent to assign clearly appear. But that intent must clearly appear. It is not sufficient that equivocal language be used. Standing by itself, the language testified to in this case amounts to no more than a mere promise to pay out of a particular fund, a given portion thereof.

If the circumstances shown by the findings are looked to for the purpose of throwing light upon the intent of the parties, it will be found that there is nothing to bear out the idea that an assignment was intended. It does not appear that Barnes, Barnes & Martin, or O'Connell were insolvent, or in such financial circumstances as to render their personal promise to pay the fee uncertain. There is no claim that Street & Alexander had any reason to fear or did fear that, unless they had an assignment, they were in danger of losing their fee. There is no reason to believe that a personal promise on the part of Barnes was not as satisfactory to Street & Alexander as an assignment in the most positive terms. The conversation, as given, was the not uncommon one between lawyers, in which one, desiring assistance, agrees to pay over a portion of his fee to another for assisting him, and in which the one rendering the assistance never dreams of looking to anything except the promise to pay.

Moreover, both Barnes and Street were eminent lawyears. Both knew perfectly well what was necessary to create an equitable assignment, and how to express that idea in appropriate language. If Barnes had intended to give, or Street to demand, an assignment of a portion of the fee, it is not believable that they would not have made, either orally or in writing, an assignment in unmistakable terms. The relations of the parties preclude the idea that either of them had any idea of making an assignment of the one-third agreed to be paid, but simply that one gave and the other accepted the personal promise of his old-time friend to pay over a portion of the fee when received.

The all essential fact of intent was not found by the Supreme Court.

It appears that the trial court made no findings at all. Under Section IV, Chaper 74, Laws of 1907, amending Paragraph 1406 Revised Statutes of Arizona, none were required.

The only portion of the statement of facts found by the Supreme Court bearing upon the agreement between Barnes & Martin and Street & Alexander is as follows:

> " 'Now, I want you to attend to this case (referring to the Triangle case). I have to go back to New York. Now, if you will attend to this case, if you will agree to attend to this case, I will give you one-third of the fee which I have coming to me on a contingent fee from Shattuck, Haninger and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third.' "

"That Judge Barnes, for the firm of Barnes & Martin, and Street & Alexander had several conferences relative to the contingent fee which Barnes & Martin were to receive from Shattuck, Hanninger and Marks, in which Barnes told Street & Alexander that the fee was one-fourth of whatever was realized from the prosecution of the cases for Shattuck, Hanninger and Marks, and told them that they, Street & Alexander, should get one-third of that, if they cared to take up and perfect the appeal and argue the case before the Supreme Court on the motion for a rehearing, and perfect the appeal in the Triangle case, and that Street & Alexander agreed to do it, accepting his offer, and did the work." (Page 101, folio 197.)

It will be observed that this is not a finding of fact, but a statement of evidence. Had the Supreme Court of the Territory, from this evidence, considered alone or in conjunction with the other evidence before it, found as a fact that Barnes & Martin intended to assign one-third of their fee to Street & Alexander, or to create a lien in their favor,

such fact so found would, perhaps, have been binding upon this court.

We say "perhaps," because the transmission to this court of the evidence converts the inference to be drawn therefrom into a conclusion of law analogous to the interpretation of a written contract.

Zeckendorf vs. Steinfeld, 225 U. S., 445.

We appreciate the immutability of the rule adopted by this court that it will not go beyond the statement of the Territorial Supreme Court for the purpose of determining any fact, and that the facts so stated must be considered as conclusively established by the evidence.

We take it to be a corallary from this rule that no fact, not plainly found by the Supreme Court of a Territory, and which is essential to the sustaining of the judgment, will be supplied by this court in aid of a judgment when the burden of establishing such fact rests upon the party in whose favor the judgment was rendered.

In this case the burden was upon the intervenors to establish the equitable assignment or lien; and therefore to procure from the Territorial Supreme Court a finding of all facts necessary to sustain a conclusion of law that such an assignment or lien existed. A finding of evidence, even though it tend to establish an essential fact, is not a finding of such a fact. If the court, proceeding unscientifically, find evidence when it ought to find a fact, such finding is ineffective unless the fact required to sustain the judgment is a necessary and inevitable inference from such evidence, so misnamed a finding; otherwise the Territorial Supreme Court in effect transmits evidence to this court, thus making it incumbent upon this court to examine the evidence and determine the facts, something which it has repetedly declared that it has not the jurisdic-

tion to do and will not do. The evidence above quoted is far from compelling an inference that the parties intended to establish an equitable assignment or lien; furthermore, it is significant that the Territorial Supreme Court carefully refrained from incorporating in its statement any inference whatever on the subject. In its opinion it said:

> "The judgment of the trial court could only have been rendered upon the finding that the evidence showed it to have been the intent of the parties that Street & Alexander should rely on the proceeds of the litigation rather than on the personal liability of Barnes, or the firm of Barnes & Martin. There being substantial evidence to support such finding, it must be treated as conclusive here." (Transcript, page 90, folio 175.)

This expression is not sufficient to supply the absence in the statement of facts of the fact of intent, so essential to create an equitable assignment or lien. It will be noted from the last two lines quoted that the court studiously withholds a declaration that it regarded the evidencee as proving the existence of an intent to create an equitable interest in the fee.

It first assumed that the trial court was correctly advised as to the law. We submit that this, the major premise of the reasoning which followed, was unsound. For the appeal to that court, as is every appeal, was predicated upon error of law in the trial court. Therefore, the conclusion of the Supreme Court that the trial court committed no error, deduced from an assumption that it committed no error, constitutes a perfect example of the vicious circle.

Upon this illogical assumption the Supreme Court based a further assumption, not that there was an intent to create an equitable assignment, but that the trial court must have

intended to so find. Having by this process of reasoning spelled out a finding of fact by the trial court, which as a matter of fact it never made, the Supreme Court invoked the rule prevailing in Arizona, that no finding of fact of a trial court will be disturbed if there be any evidence to sustain it, and finding some evidence to sustain this imaginary finding of the trial court, announced itself bound by it, and proceeded to affirm the judgment.

There remains a further consideration with respect to the intent of the parties. The Arizona Supreme Court says:

> "Judge Barnes in a letter to his partner said: 'I won both Shattuck cases with jury. He says we are to have one-fourth of the ground.' Alexander's testimony that 'I didn't consider that the estate of Barnes owed us anything: I considered that I had an interest in this claim," taken alone, and indicating the understanding of the agreement of only one of the parties to it, would have little weight, as the understanding of the other party might have been entirely differeent, but taken in consideration with the theory upon which the plaintiff instituted her action at a time when she presumably possessed some general knowledge of the contract betwen Barnes & Martin, to whose interest she succeeded, and the defendants, and the statement of Judge Barnes in his letter indicating an understanding that the contingent fee of Barnes & Martin gave them an interest in the proceeds of the litigation, color is given to the theory that by the words, 'I will give you one-third of the fee,' it was his intention that an equitable assignment should be created rather than a personal liability." (Transcript, page 90, folio 174, 175.)

It is further said in the opinion:

> "The appellant must have instituted her action upon the theory that the fee of Barnes & Martin consisted

of an equitable interest in the proceeds of the compromised litigation to the extent of one-fourth of the money and property received by the defendants thereunder. Under no theory than that of an equitable assignment might she invoke an accounting and a decree requiring the defendants to transfer and assign to her one-fourth of all the stock in said corporation received by them." (Page 89, folio 172.)

The argument of the court seems to be that since there is a similarity between the contract of the defenedants with Barnes & Martin and that of Barnes & Martin with Street & Alexander, the construction the plaintiff put upon the former contract in her complaint may be considered as important by way of estoppel in arriving at a proper construction to be put upon the latter; in other words, that since the plaintiff brought her action on the theory that she was the owner, by reason of an equitable assignment, of one-fourth of the proceeds of the litigation, she cannot be heard to say that the contract between Barnes & Martin and Street & Alexander did not also amount to an equitable assignment *pro tanto*. The court concludes that such is the theory of her suit because she asks for an "accounting and decree requiring the defendants to transfer and assign to her one-fourth of all the stock in said corporation received by them," and "under no other theory than that of an equitable assignment might she invoke an accounting and a decree requiring the defendants to transfer and assign to her one-fourth of all the stock in said corporation received by them."

This is novel doctrine. Upon the completion by Barnes & Martin of their contract, and the receipt by the defendants of the proceeds of the settlement, it became their duty to pay to plaintiff one-fourth thereof. The plaintiff sued for the stock or its value. After its receipt by the

defendants and their failure to turn over one-fourth to the firm of Barnes & Martin or its successors in interest, they constituted themselves trustees, and they could not be heard to say that becausee there had been no assignment, they could not be forced to account.

But even if we accept the court's view of this particular question, and even if we agree that the letter from Barnes quoted in the excerpt indicated that he thought he had an equitable interest in the proceeds of the litigation, and even if we give to the testimony of Alexander the weight the court attached to it, it nevertheless remains that the court did not regard these matters as showing any intent on the part of Barnes & Martin to give Street & Alexander an equitable interest. Under no conceivable construction of the language of the Supreme Court can it be said that that court makes a finding, even in its opinion, or a declaration equivalent to a finding, that the parties intended to create an equitable assignment. Upon the strength of the considerations named by the court in the above quoted excerpt, it is not said that "it is clear" that the parties intended, etc., or "manifest," or "plain," or "likely," or "probable," or "we think it can be said." The farthest it appears willing to go was to say: "*Color* is given to the theory that by the words, 'I will give you one-third of the fee,' it was his intention that an equitable assignment should be created rather than a personal liability."

It is plain that the territorial Supreme Court at no time undertook to find as a fact that the parties intended to create an equitable assignment. It felt itself bound to affirm the judgment of the trial court because of its mistaken assumption that that court had made a finding that the parties intended to create an equitable assignment, which assumption, as has been said, was based upon its equally

mistaken assumption that the trial court's view of the law was sound.

In conclusion, it is manifest that the Territorial Supreme Court did not of itself find that there was an intention to create an assignment or a lien, and made no such certification to this court.

In effect it passed the issue to this court. The law requires the Territorial Supreme Court to make statement of facts in the nature of a special verdict, which is the basis of the determination of the law by this court. The duty so imposed, the Territorial Supreme Court did not fulfill. There can be no equitable assignment unless as a matter of fact the parties intended to create one, and neither the trial court nor the Territorial Supreme Court having found the fact of such intent, it will not be assumed by this court, and the judgment must be reversed as not being sustained by the statement of facts.

III.

The claim of the interveners is a personal one against the firm of Barnes & Martin, and their failure to present it against the estate of Barnes bars them from asserting it against his legatee, the plaintiff, the estate being closed.

Par. 1742, Rev. Stat. 1901, provides:

"All claims arising upon contracts hereafter made, whether the same be due, not due or contingent, must be presented within the time limited in the notice; and any claim not so presented is barred forever."

From the fact that the estate of Barnes had been administered, closed, and final distribution made, it follows as a matter of law that the proper notice had been given, the debts paid as recited in the decree, and that all claims presented to the executor had been finally disposed of. That

the claim of intervenors was not so presented is found. (Finding 17, page 103, folio 201.)

The object of the above statute was to require every claim of every kind, arising upon contract, to be presented to the executor or administrator within the time specified in the notice given for that purpose. This is emphasized by Par. 1749, which prohibits the bringing of suit upon a claim unless so presented, and Par. 1751, which requires presentation even when a suit is pending for the recovery of the claim.

And presentation of a claim against a partnership, which is sought to be recovered from the estate of a deceased partner, must be made as other claims.

Nagle vs. Ball, 71 Miss. 330, 13 So. 929.

The claim not having been presented as required, is, so far as the right to recover from the estate of Barnes is concerned, in the language of the statute, "barred forever." And if it be claimed that Mrs. Barnes, as legatee, is liable by reason of having received property of the estate, the answer is that an heir or legatee cannot be held liable for the debts of the deceased, if the primary liability of the estate has ceased because of non-presentation of the claim.

Hill vs. Nichols, 47 Minn. 382, 50 N. W. 367.

IV.

The judgment of the Supreme Court of Arizona is excessive, in that it includes one-half of $12,500.00, *whereas the findings show the plaintiff received* $10,625.00 *only.*

This heading covers paragraph "b" of Assignment VI, Assignments VIII and IX.

The agreement between Barnes & Martin and Street & Alexander was, according to the pleading and proof of the intervenors, that each of those firms should receive one-

third of the fee, or in other words, that each should receive the same amount. Mrs. Barnes was not a party to that contract, and no privity of contract between herself and the intervenors is shown, upon which her personal liability can be based. If she is to be held personally liable, it must be because she has received a portion of the money paid on acount of the fee, which she ought to pay over to those to whom Judge Barnes had agreed to pay it. But her liability, on this theory, could not amount to more than one-half the amount she received. To go further and make her personally liable for the full amount claimed by the intervenors, without regard to the amount she received, would be unwarranted on any possible theory.

The amount received by Mrs. Barnes was $10,625.00 (Finding 22, p. p. 104); $1,875.00 was paid to Martin, the surviving partner, in June, 1905. There is no proof that Mrs. Barnes ever received any part of this payment. One-half of the amount received by Mrs. Barnes is $5,312.50. Judgment was rendered against her for $6,250.00. The difference between one-half of what she received and the amount of the judgment is $937.50, and to this extent the judgment is clearly unwarranted.

V.

It was error to allow proof of payments made to plaintiff subsequent to the filing of the complaint in intervention.

(This heading covers Assignment II.)

This action was commenced Oct. 23rd, 1907. (page 4, folio 6.) The complaint in intervention was filed December 28th, 1907 (page 5, folio 8). The amended complaint in intervention contained merely the additional allegations made necessary on account of the death of Judge Street since the filing of the original complaint in intervention. The payment by O'Connell to Mrs. Barnes

was made April 23rd, 1909. (Finding 21, page 104.) The amended complaint in intervention, filed April 26th, 1909, contained no reference to this payment, nor was any supplemental or amended pleading filed, setting up this payment and praying judgment against Mrs. Barnes. Testimony to this payment was received over the objection of plaintiff (page 48).

The admission of this evidence was obviously prejudicial. Being responsive to no allegation of the pleading, it was immaterial, and should have been disregarded. Without it there is no basis for the judgment.

We have argued that the intervenors were at most mere creditors of Barnes & Martin, and their sole remedy was by suit against that firm or its surviving partner. But even if it should be held that the transaction amounted to an equitable assignment, the intervenors had no right, under the circumstances, to a judgment against Mrs. Barnes. Such an assignment would give them a right to recover directly from the defendants, after notice to the defendants of the assignment, and payment, after such notice, would not affect their rights.

Todd vs. Meding, 56 N. J. Eq. 83, 38 Atl. 349.

So, it has been held, in a suit to enforce a claimed equitable assignment, that payments made pending the action, by one of the defendants to an intervenor, were immaterial.

Tone vs. Shankland, 110 Iowa 525, 81 N. W. 789.

As the case stood at the time of the filing of the complaint in intervention, if the intervenors had any rights they were against the defendants, and not Mrs. Barnes. If, by reason of matters occurring after the filing of the intervening complaint, their rights had changed and they were entitled to other or different relief, there must be a supplemental

pleading, setting up those facts, in order to entitle them to such relief.

Ordinarily, the rights of parties to an action are determined as of the time of the commencement of the suit. Matters occurring afterward may be set up in a supplemental pleading, or an amended pleading in the nature of a supplemental pleading. Ignoring any distinction between supplemental and amended pleadings, or the right to amend instead of filing a new pleading, it is insisted that without some sort of a pleading setting up the alleged payments, the rights of the intervenors must be determined as they existed at the time of the filing of their original complaint.

The rule on this subject has been stated as follows:

"The rights of parties are to be determined as they were at the commencement of the action, unless some event happens subsequently which affects the matters at issue, and the court cannot consider such subsequent matters unless it is presented by a supplemental pleading."

21 Enc. Pleading and Practice, 9.
Wisner vs. Ocumpaugh, 71 N. Y. 113.
Styles vs. Fuller, 101 N. Y. 622, 4 N. E. 348.

And such is the rule in equity.

Mellor vs. Smither, 114 Fed. 116.

As the case stood at the time the original complaint was filed, the intervenors could have been entitled to no relief as against Mrs. Barnes, certainly not a money judgment, because at that time she had received nothing. The payment made pendente lite could not affect the rights of the intervenors against the defendants, for the reasons above stated. If it was sought by the intervenors to cease the pursuit of the defendants, and to claim a personal judgment against Mrs. Barnes because of such payment, the

facts upon which such claim was based should have been set forth in either an amended or supplemental pleading. This not having been done, the evidence as to the payment to Mrs. Barnes should not have been received, and no judgment should have been rendered against her.

It is conceded that there was no privity of contract between Mrs. Barnes and the intervenors. Their right to recover against her depends upon the legal principle that, being the owners of a portion of the fee of Barnes & Martin in the hands of the defendants, they have the right to follow that fee, provided they can identify it, into whosesoever hands it may have gone.

Inasmuch as Mrs. Barnes had not received any portion of this fee at the time of the commencement of this action, or at the time of the intervention, it follows that at neither of such times did appellees have any claim to a money judgment against her. Their cause of action against her, if any, consisted in their right to a judicial determination that they, and not she, owned the one-third of the cause of action against the defendants. Upon their theory, to-wit, that their contract with Barnes & Martin constituted them equitable assignees, their right to substantial recovery was against the defendants, and such right, if it ever existed, continued during the course of the entire litigation, and it was not possible for the defendants and Mrs. Barnes, by any adjustment between themselves, to defeat or impair such right which the intervenors had against Shattuck and his associates.

It appears by the minute entries and by the judgment (page 37) that judgment was rendered in favor of Shattuck and his associates, the defendants, and against the intervenors, and from this judgment the intervenors do not appear to have appealed.

All authorities unite in stating that the test of whether an equitable assignment exists or not, is the right or absence of right in him who claims to be the equitable assignee to proceed direct against the party holding the fund.

Therefore the judgment is on its face inconsistent.

If it were an equitable assignment, judgment should have been rendered against the defendants Shattuck and his associates.

If it were not an equitable assignment, it should have been rendered in favor of Mrs. Barnes. In no event could it have been properly rendered in favor of Shattuck and his associates and against Mrs. Barnes; and inasmuch as it was so rendered, it should be reversed.

In any event, however, it must be conceded that the judgment rests upon facts which transpired subsequent to the commencement of the action, and which were never pleaded, and therefore, under the authorities cited, the evidence of such facts was improperly admitted, and the judgment should be reversed.

The court disposes of this contention in the following language:

> "Error is predicated upon the rendition of judgment against the plaintiff in favor of the intervenors, upon the theory that as intervenors claimed an equitable interest in the fee or fund, and did not plead payment to the plaintiff, judgment could only have been rendered against the defendants; but the defendants pleaded the payment, and after the filing of their answer setting up such payment, the plaintiff moved to dismiss as to the defendants. The motion was taken under advisement by the court, and, in effect, granted by the final judgment rendered.
>
> "The plaintiff did not deny that payment had been made as pleaded by the defendants after such suit was brought, and by the motion in effect admitted the

truth of such averment, and, consequently, judgment was properly rendered against the holder of the fund." (Page 91, folio 176.)

Such facts were set forth in defendants' answer to the complaint in intervention, in the following language:

"That thereafter the said J. M. O'Connell paid to the said Barnes & Martin, Belle J. Barnes, as executrix of William H. Barnes, deceased, and also assignee of Barnes & Martin, the sum of $12,500, as full payment and satisfaction of the interest of Barnes & Martin in said contract."

It will be observed:

First: That the plaintiff cannot be bound by allegations in the answers of the defendants.

Second: That it is nowhere stated in the answer of the defendants that the $12,500 were paid subsequent to the commencement of the action; and

Third: That the allegation is that such amount was in full payment and satisfaction of the interest of Barnes & Martin in said contract, and there is no suggestion that it was intended by such payment to cover the claim of the intervenors.

We respectfully submit that the introduction of this testimony over the objection of the plaintiff constituted error which necessitates the reversal of the judgment.

VI.

There is no proof that the appellant received that portion of the fund claimed by the appellees.

It is well settled that where there are conflicting claimants to a fund and one receives it, the other, even though he prove himself to be entitled to it, must look for his recovery to the party who held the fund, and paid it to the wrong party.

The principle is that in actions other than actions *ex delicto* there must be privity between the parties. Of course such privity may be express or implied; but if the circumstances are such as to repel the implication of a contract, as is so in the case of a *bona fide* conflicting claimant, no such implication will be made by the court, and there will be no privity and no recovery.

The rule is stated in the 27th volume of Cyc., at page 859, as follows:

"Where there are two claimants for the same money, and one of them is recognized as being entitled to it by the person from whom it is due, and is paid, the other cannot sue him to recover the money, for the reason that, having received the money under a claim of right in himself, the law will not imply any contract or promise by him to hold the money for the use of the other claimant, or to pay it over to him, and, therefore, there is not, under the circumstances, any privity of contract on which to found the action."

The appellees, therefore, in order to maintain their judgment, must rely upon the application of the doctrine that the fund in the hands of the defendants was a specific fund, of which they owned one-third, and that they have the legal and equitable right to follow and recover their one-third from anyone in whose hands they can identify it.

In order that one may follow money in pursuance of this principle, it is essential that it be clearly identified by the evidence as being the fund which belonged to him, or upon which he had a lien.

We submit that there is no evidence in this case sufficient to establish any such identification.

The following conditions prevailed:

The defendants owed something, whether it were money or property, either to the appellant, or in part to the ap-

pellant and in part to the appellees. This action was pending, and Mrs. Barnes on the one hand, and Street & Alexander on the other, each under their respective pleadings, had the right to recover from the defendants that to which they might show themselves to be respectively entitled. Both of them claimed from the defendants property far in excess of the $10,625 which was subsequently paid by defendants to Mrs. Barnes.

While this action was pending the defendants made an adjustment with Mrs. Barnes. They certainly had a right to settle separately with her for that portion of the fee of Barnes & Martin to which she was entitled; and then either to settle or litigate with the appellees as to the money or property claimed by them.

It is true that the amount paid to her, added to that previously paid to John H. Martin, constituted the precise amount which they, the defendants, claimed was all that they owed under their original contract with Barnes & Martin. But Mrs. Barnes claimed to be entitled, even conceding the intervenors their one-third, to much more than the defendants admitted to be owing, and so did Street & Alexander.

Before the trial, and before any proof was offered, the defendants came to this adjustment with Mrs. Barnes, and upon the trial, and before any evidence was submtited, she dismissed as to them.

We submit that there is no evidence or finding that in her adjustment with the defendants she settled, or undertook to settle, any portion of the claim of the appellees, and that therefore in no view of the contract between Barnes & Martin and Street & Alexander, is there basis for the judgment which was rendered against Mrs. Barnes.

If, as frequently suggested, the test of equitable assignment *vel non*, is whether the alleged assignee could have

maintained an action directly against the debtor, the instant case shows no such right.

The ordinary rule is that where an attorney employs another to assist him, the client is under no obligation to compensate the latter, in the absence of an agreement, express or implied, to that effect. And no inference can be drawn that there is such an agreement from the mere fact that the attorney so employed appears in court and assists in the conduct of litigation, with the knowledge of the client and without objection.

Porter vs. Elizalde, 125 Cal. 204, 57 Pac. 899.
Price vs. Hay, 132 Ill. 543, 24 N. E. 620.

A mere agreement between the attorneys to divide a fee, contingent or otherwise, could create no rights in the attorney employed by the other, to recover his share of the fee from the client.

The familiar agreement between real estate brokers to act together in making a sale, and to divide the commissions, furnishes an analogy. In such cases the principal is only liable to the broker originally employed, and the other must look to his fellow broker for his compensation.

J. B. Watkins Land Mortgage Co. vs. Thetford, 96 S. W. 72.
More vs. Traybor, 26 Neb. —, 42 N. W. 719.
Carroll vs. Tucker, 21 N. Y. Supp. 952.

VII.

The evidence as to what Costello and his attorneys said with reference to the weight given to the pending appeal to the United States Supreme Court was admissible.

(This heading covers Assignment III.)

The plaintiff's counsel, in connection with the cross-examination of the witness O'Connell, who had testified to the making of the settlement between defendants and

Costello, asked what was said by Costello or his attorneys with respect to the appeal then pending in the Supreme Court in the Triangle case. This was objected to by counsel for the intervenors as incompetent and immaterial, and excluded by the court. (Page 55, folio 105.)

As has been stated, the only case in which Street & Alexander performed any service was the Triangle case. It will not be claimed that these services were of a serious character or of great value. The sole point presented on the motion for re-hearing was that the appeal bond had not been filed within twenty days after the term at which the judgment was rendered, and, therefore, this court had not acquired jurisdiction. Whether this point was well taken or not depended upon a mere matter of dates. The date of the adjournment of the term and the date of the filing of the bond being ascertained, the result of the motion followed. That the filing of the bond within the statutory period was jurisdictional had been settled by a number of decisions of the Supreme Court of Arizona, and no counsel could hope, by argument, to convince the court otherwise.

Territory vs. Doan, 7 Arizona 80.
Reilly vs. Crowley, 3 Arizona 286.

When it was ascertained that the bond was not filed in time, there was nothing further to be said; the dismissal of the appeal necessarily followed. The appeal to the Supreme Court of the United States, as has been argued, had no merit whatever, and Barnes & Martin and Street & Alexander all so regarded it; its only object, as heretofore said, being to prolong the litigation and thus force some sort of a settlement. (Finding 11, folio 97.)

In view of the decisions of the Supreme Court of the United States as to the weight to be given the construction of territorial statutes by territorial courts, it is quite ap-

parent that these gentlemen were justified in their view that there was no hope of reversal, and all they could hope to do was, by preventing the issuance of patent for two or three years, to bring about a compromise. Other than as a weapon of defense, the appeal was not regarded seriously by any one on the Shattuck side of the controversy, and if the proposed evidence had been admitted it would have shown that Costello and his counsel thoroughly understood that the appeal was groundless, and that in making the settlement it did not enter into serious consideration, or enhance the amount to be received by Shattuck and his associates. The frivolous character of this appeal, and the fact that its lack of merit was well known by both sides, and that the only consideration it received was that incidentally it was to be gotten rid of, bears upon the reasonableness or probability of Barnes having, for the services of so slight a character, rendered upon this valueless appeal, agreed to pay as much as his firm received for the amount of work they had done throughout the conduct of the litigation.

Evidence, not otherwise material or relevant, may be introduced to aid the court or jury in determining the reasonableness or unreasonableness of the plaintiff's claim.

16 Cyc. 1119.
Dodge vs. Weill, 158 N. Y. 346, 53 N. E. 33.
Barney vs. Fuller, 133 N. Y. 605, 30 N. E. 1007.

The fact that no benefit was derived from the intervenors' services would bear materially upon the value of such cervices, and even where an express contract is alleged, evidence of the value of the services is admissible as bearing upon the probability of the alleged contract having been made.

Barney vs. Fuller, *supra*.

The rule ought to be especially applicable in a case like this. The only living witness who can testify as to the conversation with Barnes is Alexander, an interested party. His testimony as to the alleged contract cannot be directly contradicted. Any fact or circumstance, therefore, which could bear upon the probability of the contract having been made as he testified, ought to be admitted.

VIII.

It was error to exclude the telegram, exhibit 3.

(This heading covers Assignment V.)

The contract with Street & Alexander, if made, was made with the firm of Barnes & Martin, and not Barnes individually. The intervenors' pleading proceeds upon that theory, and the evidence is on the same line. Anything, therefore, that tends to throw light upon the understanding of Barnes and Martin, or Barnes or Martin, is material and admissible as bearing upon the meaning to be given to the language used by Barnes, and the probability of his having made the statement ascribed to him.

The understanding of one of the parties to a conversation is admissible.

Mayhew vs. Brislen, 13 Ariz. 102, 108 Pac. 253.

It was shown at the trial of the Triangle case that the discovery monuments of the Roy and Leo claims were both upon the ground included in the Standard Quartz claim. This, of course, rendered the Roy and Leo locations invalid if the Standard Quartz location was held valid, regardless of what might be the outcome of the Triangle case. That Barnes and Martin both understood this, and consequently regarded the Triangle case as of little importance, is a circumstance which bears upon the probability

of Barnes having made the contract alleged for services in the Triangle case alone, and is therefore admissible.

Dodge vs. Weill, 58 N. Y. 346, 53 N. E. 33.
Barney vs. Fuller, 133 N. Y. 605, 30 N. E. 1007.

For these reasons it is submitted that the judgment appealed from should be reversed, and, if the views of the appellant as to the effect of the transaction between Barnes & Martin and Street & Alexander are correct, judgment absolute should be ordered in her favor. In any event, the judgment should be modified by eliminating the amount herein shown to be excessive.

EUGENE S. IVES,
Attorney for Appellants.

SUBJECT INDEX.

Page.

Point I—The judgment of the court below is supported by the findings of fact made by the supreme court of the Territory of Arizona..... 1-24

Point II—No error in the admission or rejection of evidence was committed by the trial court..... 25-28

Point III—For the reasons stated, the judgment of the lower court should be affirmed..... 29

Index of Cases Cited.

Albright *vs.* Sandoval, 216 U. S., 331..... 2

Apache County *vs.* Barth, 177 U. S., 538..... 3, 26

Armijo *vs.* Armijo, 181 U. S., 558..... 2

Bank of Hanover *vs.* Williams, 79 N. C., 136..... 18

Bear Lake Irrigation Co. *vs.* Garland, 164 U. S., 1..... 3, 24

Blakey *vs.* N. Y. Life Ins., 28 Ind. App., 428..... 18

Bogert *vs.* Adams, 8 Colo. App., 185..... 18

Boyle *vs.* Boyle, 106 N. Y., 654..... 17

Browder *et al. vs.* Long's Ex'r *et al*, 66 S. W., 600..... 27

Central R. R. *vs.* Pettus, 113 U. S., 116..... 18, 21

Chester *vs.* Jumel, 125 N. Y., 237..... 17

Christmas *vs.* Russell, 14 Wall., 69..... 19

Clason *vs.* Matko, 223 U. S., 646..... 2

Cooke *vs.* Thresher, 51 Conn., 105..... 18

Copper Queen Mfg. Co. *vs.* Arizona, 206 U. S., 474..... 2

Coudry *vs.* Galveston, 93 U. S., 352, 355..... 18

Curtin *vs.* Benson, 222 U. S., 85..... 28

Eagle Mining Co. *vs.* Hamilton, 218 U. S., 513..... 3, 26

English *vs.* Arizona, 214 U. S., 359..... 2

Fairbanks *vs.* Sargent, 104 N. Y., 108..... 17

Fairbanks *vs.* Sargent, 117 N. Y., 380..... 17

Fourth St. Bank *vs.* Yardley, 165 U. S., 634..... 18, 21

Fox *vs.* Haarstick, 156 U. S., 674..... 2

Frink *vs.* McComb, 60 Fed. Rep., 486..... 18

Goldman *vs.* Sawtello, 7 Ariz., 23..... 25

Gonzales *vs.* Buist, 224 U. S., 126..... 26

Grayson *vs.* Lynch, 163 U. S., 468..... 3, 26

Gulf, C. & S. F. Ry. Co. *vs.* Eldredge, 80 S. W., 556..... 12, 18, 21

Halmer *vs.* Evans, 129 N. Y., 140..... 17

Harrison *vs.* Peres, 168 U. S., 311, 323..... 3

Page

Harwood *vs.* La Grange, 137 N. Y., 583 19
Haws *vs.* Victoria, etc., Co., 160 U. S., 303 3
Hoffman *vs.* Vallejo, 45 Cal., 564 ..... 18, 24
Idaho, etc., Co. *vs.* Bradbury, 132 U. S., 509 3
Ingersoll *vs.* Coram, 211 U. S., 335 ..... 17, 18, 19, 20, 21
Kealoha *vs.* Castle, 210 U. S., 149 2
Ketchem *vs.* St. Louis, 101 U. S., 306 ..... 18, 21
Lewis *vs.* Harwood, 10 N. W., 586 12
London-Paris, etc., Bank *vs.* Abrams, 6 Ariz., 87 2
Louisville, etc., Ry. Co. *vs.* Wilson, 138 U. S., 501 ..... 18, 21, 23
McClurg *vs.* State Bindery Co., 53 N. W., 428 12
McPherson *vs.* Cox, 96 U. S., 404 20
Mahone *vs.* Southern Telephone Co., 33 Fed. Rep., 702 18
Mammoth Mining Co. *vs.* Salt Lake Machine Co., 151 U. S., 447, 450. 3
Neslin *vs.* Wells, 104 U. S., 428 3
Paschal, *in re*, 10 Wall., 483 20
Patten *vs.* Wilson, 38 Pa. St., 299 18
Petticolas *vs.* Carpenter, 53 Tex., 23 24
Sandoval *vs.* Randolph, 222 U. S., 161 2
San Pedro, etc., Co. *vs.* United States, 146 U. S., 120 3
Santa Fe County *vs.* Coler, 215 U. S., 296 2
Semmes *vs.* Whitney, 50 Red. Rep., 666 18
Smith *vs.* Young, 62 Ill., 210 18
Stringfellow *vs.* Cain, 99 U. S., 610 3
Sweeney *vs.* Lomme, 22 Wall., 208 2
Templeton *vs.* Gresham, 60 Tex , 53 24
Thomas *vs.* N. Y. & G. L. R. R. Co., 139 N. Y., 179 17
Treat *vs.* Grand Canyon Ry. Co., 222 U. S., 448 2
Trist *vs.* Child, 21 Wall., 441 ..... 19, 21
Walker *vs.* Brown, 165 U. S., 654 ..... 18, 21
Williams *vs.* Ingersoll, 89 N. Y., 108 17
Wilson *vs.* Seeber, 66 Atl., 909 18
Wright *vs.* Ellison, 1 Wall., 16 ..... 19, 21
Wright *vs.* Wright, 70 N. Y., 98 17
Wylie *vs.* Coxe, 15 How., 415 ..... 17, 20
Yetzer *vs.* Young, 52 N. W., 1054 12
Young *vs.* Amy, 171 U. S., 179 ..... 3, 24, 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 445.

BELLE J. BARNES, L. H. MANNING, AND EPES RANDOLPH, APPELLANTS,

vs.

J. L. B. ALEXANDER AND MARY E. STREET, EXECUTRIX OF WEBSTER STREET, DECEASED, APPELLEES.

BRIEF FOR APPELLEES.

POINT I.

The Judgment of the Court Below is Supported by the Findings of Fact Made by the Supreme Court of the Territory of Arizona.

The appellants claim that the appellees, who were the intervenors below, were not entitled to intervene in this litigation. This question in reality involves only the construction or interpretation of a local territorial statute upon a mere question of practice.

The subject of intervention in Arizona is regulated by

paragraph 1278 of the Revised Statutes of Arizona of 1901, which is as follows:

> "Any person who has an interest in the subject matter of the suit which can be affected by the judgment, may, on leave of the court or judge, intervene in such suit or proceeding at any time before trial."

This statute is identical with the former statute upon the subject, namely, paragraph 656 of the Revised Statutes of Arizona of 1887.

This latter statute has been construed by the Supreme Court of Arizona.

That court has held that the granting of the right to intervene is purely discretionary with the trial court.

London-Paris, etc., Bank vs. Abrams, 6 Ariz., 87, 90; 53 Pac., 588.

The rule repeatedly announced by this court is that the construction placed upon a local statute by a territorial Supreme Court will be adopted by this court and will not be disturbed in the absence of manifest error in such construction.

Sweeney vs. Lomme, 22 Wall., 208, 213.
Copper Queen Mfg. Co. vs. Arizona, 206 U. S., 474.
Kealoha vs. Castle, 210 U. S., 149, 153, 154.
Treat vs. Grand Canyon Ry. Co., 222 U. S., 448, 452.
English vs. Arizona, 214 U. S., 359, 361, 363.
Fox vs. Haarstick, 156 U. S., 674.
Clason vs. Matko, 223 U. S., 646, 653.
Armijo vs. Armijo, 181 U. S., 558, 561.
Santa Fe County vs. Coler, 215 U. S., 296, 305.
Albright vs. Sandoval, 216 U. S., 331, 339.
Sandoval vs. Randolph, 222 U. S., 161, 164.

There is no manifest error in the rulings of the court construing the statute quoted, from which it follows that as to this contention of the appellants the ruling of the court below must be affirmed.

But, inasmuch as this is an appeal from a judgment of the Supreme Court of a Territory, this court's jurisdiction is controlled and regulated by the act of April 7, 1874, chapter 80, 18 Stats., 27.

Under this statute this court has repeatedly held that its jurisdiction upon appeals taken under this statute is confined and limited to an inspection of findings of fact to see if the findings support the judgment, and to a review of the exceptions which were duly taken to the rulings of the trial court upon the admission and exclusion of evidence.

Young vs. Amy, 171 U. S., 179, 183.
Harrison vs. Perea, 168 U. S., 311, 323.
Mammoth Mining Co. vs. Salt Lake Machine Co., 151 U. S., 447, 450.
San Pedro, etc., Co. vs. United States, 146 U. S., 120, 131.
Apache County vs. Barth, 177 U. S., 538, 542.
Bear Lake Irrigation Co. vs. Garland, 164 U. S., 1, 18.
Grayson vs. Lynch, 163 U. S., 468, 473.
Hawe vs. Victoria, etc., Co., 160 U. S., 303, 312, 313.
Stringfellow vs. Cain, 99 U. S., 610.
Neslin vs. Wells, 104 U. S., 428, 429.
Idaho, etc., Co. vs. Bradbury, 132 U. S., 509, 514, 515.
Eagle Mining Co. vs. Hamilton, 218 U. S., 513, 515.

An inspection of the findings of fact shows that they do support the judgment rendered.

It appears from the findings of fact made by the court below that the court found that—

1. For a number of years prior to November 10, 1904, William H. Barnes and John H. Martin were copartners, engaged in the practice of law at the city of Tucson, Pima County, Arizona, under the firm name of Barnes & Martin, each member of said firm being duly admitted to practice in all the courts of the Territory of Arizona.

2. From some time in 1902 until September 1, 1907, Webster Street and J. L. B. Alexander were attorneys at law, duly admitted to practice in all the courts of the Territory of Arizona and in the Supreme Court of the United States, and engaged in the practice of their profession at Phœnix, Arizona, as partners under the firm name of Street & Alexander.

3. In 1901 one Martin Costello, claiming to be the owner of the Roy and Leo mining claims, in Warren mining district, in Cochise County, Arizona, made application to the proper United States land office for a patent to those mining claims. The defendants Shattuck, Hanninger, and Marks were the owners of the Standard Quartz claim, and the defendant Shattuck and another were the owners of the Triangle and Iron Prince claims, which all conflicted with the Roy and Leo claims of Costello.

4. During the pendency of Costello's application for a patent for the Roy and Leo claims, the defendants Shattuck, Hanninger, and Marks employed the firm of Barnes & Martin as their atorneys, to file adverse claims against Costello's application for a patent on account of the conflict of the Roy and Leo claims of Costello with the Standard Quartz, Triangle, and Iron Prince claims.

5. Pursuant to such employment Barnes & Martin did cause to be filed in the said United States Land Office adverse claims against the issuance of the patent applied for by Costello, and thereafter, within thirty days, brought suits on behalf of Shattuck and the other claimants of the Standard Quartz, Triangle, and Iron Prince claims, in support of the adverse claims so filed to determine the right to the ground in controversy between the parties.

6. Three of such suits were brought, the basis of one suit being the conflict between Costello's claims and the Triangle claim, the suit being referred to in the record as the "Tri-

angle" suit, another the conflict with the Standard Quartz claim, referred to in the record as the "Standard Quartz" case, and the third the conflict with the Iron Prince claim, referred to in the record as the "Iron Prince" case. All these suits were brought in the District Court of Cochise County, Arizona, where the property was situated.

7. In the prosecution of these suits Barnes & Martin associated with themselves one J. M. O'Connell, an attorney at law, residing at Bisbee, in said Cochise County.

8. About the time of the commencement of said suits and while the same were pending, an agreement was made between Barnes & Martin and O'Connell, on the one hand, and Shattuck, Hanninger, and Marks, on the other, with respect to the compensation of said attorneys for their services in said suits. Such agreement was that the attorneys were to receive as their compensation one-fourth of all moneys or properties received by said Shattuck, Hanninger, and Marks as the result of the litigation or by way of settlement or compromise thereof.

9. Pursuant to such employment and agreement for compensation said Barnes & Martin and O'Connell did conduct said suits on behalf of said Shattuck, Hanninger, and Marks. The suit involving the conflict with the Triangle claim, known as the "Triangle" case, was tried, and judgment was rendered in favor of Costello. From such judgment an appeal was taken by Shattuck, Hanninger, and Marks to the Supreme Court of the Territory of Arizona. This appeal was heard, and on March 18, 1902, the opinion of the Supreme Court of the Territory of Arizona was delivered, reversing the judgment appealed from. Subsequently Costello filed a motion for a rehearing of said cause, claiming that the appeal should be dismissed for the reason that the appeal bond had not been filed within the time required by the statutes of Arizona, and the Supreme Court had consequently acquired no jurisdiction of such appeal.

10. While the appeal in the Triangle case was pending the suit involving the conflict with the Standard Quartz claim, and known as the "Standard Quartz" case was tried, resulting in a judgment in favor of Shattuck, Hanninger, and Marks and against Costello. From such judgment Costello prosecuted an appeal to the Supreme Court of the Territory of Arizona.

11. After the filing of Costello's motion for a rehearing of the Triangle case, and in the latter part of January, 1903, William H. Barnes, acting on behalf of the firm of Barnes & Martin, called upon the firm of Street & Alexander, at their office in Phœnix, Arizona, and engaged their services to oppose the motion for a rehearing of the Triangle case, and in the event of an adverse decision upon said motion to perfect an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the Territory of Arizona. The question of the compensation of Street & Alexander was orally discussed at that time, and an oral agreement made between said firm of Barnes & Martin by Mr. Barnes, the senior member of the firm, and the firm of Street & Alexander with respect thereto, the oral statement and proposition or offer of said Barnes being in the following language:

> "Now, I want you to attend to this case (referring to the Triangle case). I have to go back to New York. Now, if you will attend to this case, if you will agree to attend to this case, I will give you one-third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger, and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third."

That judge Barnes, for the firm of Barnes & Martin, and Street & Alexander had several conferences relative to the contingent fee which Barnes & Martin were to receive from Shattuck, Hanninger, and Marks, in which Barnes told

Street & Alexander that the fee was one-fourth of whatever was realized from the prosecution of the case for Stattuck, Hanninger, and Marks, and told them that they, Street & Alexander, should get one-third of that, if they cared to take up and perfect the appeal and argue the case before the Supreme Court on the motion for the rehearing and perfect the appeal in the Triangle case, and that Street & Alexander agreed to do it, accepted his offer, and did the work. That the whole litigation turned upon this: That Costello was anxious to get a title to the claims and get the patent; and this proceeding was an adverse and delay in getting patent, and Judge Barnes wanted to hold this matter and force a compromise from him; that Barnes & Martin had but the one contract with Shattuck, Hanninger, and Marks for a contingent fee.

That Webster Street, one of the firm of Street & Alexander, thereafter argued the motion for rehearing in the Triangle case on behalf of Shattuck, Hanninger, and Marks. The motion for a rehearing of that case was granted by the court and the appeal was dismissed for the reason that the appeal bond was not filed in time, leaving the judgment appealed from in full force.

12. While the motion for a rehearing of the Triangle case was pending before the Supreme Court of the Territory of Arizona the appeal taken by Costello from the judgment in the Standard Quartz case came on for hearing before said Supreme Court, and was submitted upon printed arguments and briefs, at the January, 1903, term of that court. Street & Alexander, at the request of Barnes, made a formal announcement to said court, at the call of the calendar, that said case would be submitted on briefs, but performed no other services therein. The brief and argument on behalf of Shattuck, Hanninger, and Marks upon which said Standard Quartz case was submitted to said Supreme Court was prepared by Barnes, assisted by O'Connell.

13. After the granting of the motion for a rehearing of the triangle case and the dismissal of the appeal therein Street & Alexander prepared the petition for allowance of the appeal, presented the same and obtained the allowance of the appeal, prepared the assignments of error and statement of facts, prepared the bond on appeal, prepared the citation, and arranged and filed the same in the Supreme Court of Arizona, and had a transcript of the record transmitted to the Supreme Court of the United States, and took all the steps necessary to perfect such appeal. Except the argument of said motion for rehearing and the preparation of the papers on appeal to the Supreme Court of the United States, and the perfecting of such appeal, Street & Alexander performed no services in connection with any of the suits hereinbefore mentioned.

14. The appeal taken by Costello in the Standard Quartz case was submitted to the Supreme Court of the Territory of Arizona and was taken under advisement by the court. After the appeal to the Supreme Court of the United States in the Triangle case was perfected and while the appeal in the Standard Quartz case was under advisement by the Supreme Court of the Territory of Arizona, Costello and Shattuck, Hanninger, and Marks made a compromise settlement and adjustment of their differences and entered into a written contract of settlement as follows:

> "This agreement, made the 22d day of January, A. D. 1904, between Martin Costello and Mary Costello, his wife, of Tombstone, Arizona, parties of the first part, and L. C. Shattuck, H. R. Hanninger, and Emil Marks, of Bisbee, Arizona, parties of the second part, witnesseth:"

The agreement then recites the pendency of the appeal to the Supreme Court of the United States and to the Supreme Court of the Territory of Arizona in the two suits above mentioned and the desire of the parties to settle the litigation, and then provides that the parties of the first

part, in case of signing of stipulations for the dismissal of said appeals, agree to convey to the parties of the second part all their right, title, and interest in the Roy and Leo mining claims for the sum of $169,112, payable in certain instalments.

In consideration of which the parties of the second part agree that the appeals be dismissed.

The agreement further provides for the depositing of the deed in escrow, to be delivered upon payment of the amount above mentioned, and contains provisions with respect to the application of the proceeds of ores extracted pending the completion of such payment.

The agreement was signed and acknowledged by all parties and was recorded in the office of the county recorder of Cochise County.

15. Pursuant to this contract stipulations were made for the dismissal of the two appeals, and the same were dismissed, and the contract of settlement was fully carried out.

16. Subsequently Shattuck, Hanninger, and Marks received as the proceeds of the litigation and the compromise and settlement thereof the sum of $75,000, which was paid in installments. Of this amount one-fourth, or $18,750, was paid to O'Connell as the portion thereof to which Barnes & Martin and O'Connell were entitled under the agreement above mentioned. This amount was paid to O'Connell in installments, $1,250 being paid in June, 1904, $1,250 being paid in June, 1905, and the balance about November 1, 1906.

17. The copartnership of Barnes & Martin continued until November 10, 1904. On that day Barnes died testate. By his will Barnes devised and bequeathed all his property to his wife, Belle J. Barnes, the appellant. This will was subsequently probated, and in April, 1906, the estate was closed and the entire estate distributed to Mrs. Barnes. Sub-

sequently, and before the commencment of this action, Martin assigned his interest and that of the late firm in the contingent fee coming from said litigation, compromise, and settlement to Mrs. Barnes.

That before his death Judge Barnes went to Phœnix and notified Street & Alexander that a settlement was about to be effected in the Shattuck, Hanninger, and Marks cases.

That in 1905 both Martin and Mrs. Barnes were advised and had knowledge of the claim of Street & Alexander to one-third of the contingent fee.

That Street & Alexander did not file any claim against the estate of Barnes for the reason that they considered that the estate of Barnes owed them nothing, but that they had a one-third interest in the contingent fee itself.

18. That on October 23, 1907, Mrs. Barnes, as such devisee and assignee, brought this action against the defendants Shattuck, Hanninger, and Marks for an accounting and to recover one-fourth of all moneys and properties received by Shattuck, Hanninger, and Marks from said litigation and the compromise and settlement thereof, claiming that right thereto had vested in her under the distribution of the estate of Barnes and the assignment from Martin, and claiming that, in addition to money, certain stocks had been received in settlement of the litigation, and praying for a decree requiring the defendants to transfer and assign to her one-fourth of all stocks received by them.

19. The defendants answered, and while the suit was pending Street & Alexander filed a complaint in intervention, and obtained an order permitting them to intervene and to file their complaint in intervention, the complaint in intervention being drawn, signed, and sworn to by Webster Street. By this complaint they practically adopted Mrs. Barnes' complaint, alleged the agreement between themselves and Barnes and their right thereunder to one-third of the said contingent fee, and prayed an accounting between all

the parties to the action, and that they be decreed one-third of all moneys, properties, and stocks or whatever was paid, or by right ought to be paid, by Shattuck, Hanninger, and Marks to said Barnes & Martin and O'Connell.

20. While the suit was in this condition Webster Street died testate, and his will subsequently admitted to probate, and his widow, Mary E. Street, appointed executrix thereof; after her appointment as executrix Mrs. Street, as executrix, was substituted as an intervenor in place of Webster Street, deceased, by order of the court; an amended complaint in intervention was thereupon filed, differing from the original complaint in intervention only in the addition of allegations made appropriate on account of the death of Street and the substitution of his executrix.

21. Prior to the commencement of this action, and on June 17, 1905, O'Connell paid to Martin, as surviving partner of the firm of Barnes & Martin, $1,875 on account of the fee to be received by Barnes & Martin under the agreement therefor.

22. While the action was pending, and after the filing and service upon Mrs. Barnes and J. M. O'Connell of the original complaint in intervention, and while the cause was at issue but before trial, and on April 23, 1909, O'Connell paid to Mrs. Barnes the sum of $10,625, which, with the $1,875 paid to Martin and the $6,250 retained by O'Connell as his one-third, comprised the whole of the said contingent fee of $18,750, being one-fourth of all the moneys and property received by Shattuck, Hanninger, and Marks from said litigation and the compromise and settlement thereof.

These facts show that the intervenors had an interest in the subject-matter of the suit, and that such interest consisted in an ownership of a part of the subject-matter of the litigation.

Under such circumstances it is well settled that, irrespect-

ive of statute, the intervenors had a right to intervene in this cause.

Gulf C. & S. F. Ry. Co. vs. Eldredge, 80 S. W., 556.
Lewis vs. Harwood, 10 N. W., 586.
Yetzer vs. Young, 52 N. W., 1054.
McClurg vs. State Bindery Co., 53 N. W., 428.

The appellees in this case assert their equitable ownership to the extent of one-third of the subject-matter of the suit in which they successfully intervened, and claim that by reason thereof they became entitled to an equitable lien upon such subject-matter to the extent stated.

The suit was brought by the appellant Belle J. Barnes as being not in any representative capacity, but individually.

The will of her late husband, William H. Barnes, and an assignment from her husband's law partner, John H. Martin, constituted the source of her title to her cause of action. The subject of the litigation was the proceeds of the litigation in which during the lifetime of William H. Barnes he and his partner, Martin, had been retained by the defendants Shattuck, Hanninger, and Marks to render services as attorneys-at-law in connection with certain mining suits known among the parties as the "Triangle," the "Standard Quartz," and the "Iron Prince" cases.

The terms of employment were oral, and were that Barnes & Martin should have and receive from Shattuck, Hanninger, and Marks, as their compensation in and about such litigation, one-fourth of all money or property received by the said defendants as the result of such litigation or by way of settlement or compromise thereof. It appeared that the litigation instituted by Barnes & Martin, and conducted in part by them and in part by the intervenors, had resulted in a settlement or compromise, whereby Shattuck, Hanninger, and Marks received a large sum of money as the fruits of the services of Barnes & Martin and of the appellees.

The settlement took place on January 22, 1904, and was in substance that in consideration of the withdrawal of the suits referred to the defendants were to have an option upon

or right to purchase certain mining claims which were the subject of these suits for a price stated. Thereafter the defendants sold this right or option to a purchaser for $75,000 over and above the price they were required to pay for it, and later defendants began to make payments on account of the Barnes & Martin fee of one-fourth of $75,000, namely, $18,750.

No other payment was made until the following year, and in November, 1904, William H. Barnes died.

Thereafter, in October, 1907, this suit was brought to recover not only one-fourth of $75,000, but one-fourth of certain stock in the Shattuck-Arizona Copper Mining Company, which plaintiff alleged was received by defendants as part of the settlement and which she alleged to be of great value.

Thus it appears that in reality the object and purpose of the plaintiff's action was to establish her ownership of one-fourth of all the proceeds of the settlement still in the hands of the defendants, whether in money or property, and to impress thereon the equitable lien of her predecessors in interest to secure the payment thereof.

While it is true that plaintiff did not in terms demand such relief, such, nevertheless, was the necessary purport of her action. If she was not the equitable owner of one-fourth of the proceeds of the settlement by reason of the contract and fiduciary relation which existed between her predecessors in title and the defendants, upon what possible theory could the action have been maintained against the defendants in equity?

A simple contract between plaintiff's predecessors in interest and defendants surely would not support an equitable action for an accounting, and require defendants "to transfer and assign to plaintiff one-fourth of all the stock in said corporation received by them."

Plaintiff's right to an accounting was a mere incident of her real cause of action to establish her equitable ownership in one-fourth of the proceeds of the settlement and to secure its payment by impressing her lien thereon.

So that the subject-matter of the suit was *the fee of Barnes & Martin and the proceeds of the settlement out of which its payment was sought.*

With matters in this condition the appellees, in December, 1907, filed their original complaint in intervention, claiming to be entitled to one-third of the fee of Barnes & Martin, for the recovery of which this action was brought.

The intervenors claim that in January, 1903, William H. Barnes retained and employed them to render services in connection with the "Triangle" case in behalf of Shattuck, Hanninger, and Marks, in consideration of which Barnes gave the intervenors one-third of the fee, which, as Judge Barnes expressed it, "I have coming to me on a contingent fee from Shattuck, Hanninger and Marks."

It is not disputed that Judge Barnes had but one contingent fee "coming to him from Shattuck, Hanninger, and Marks," and that fee was one-fourth of the proceeds of the litigation instituted by him, in which the intervenors participated.

In determining the character of this agreement it is important that the mere words of the contract alone should not control in arriving at the intent of the parties thereto, but, as is proper in all such cases, due regard and consideration should be accorded to the relation and situation of the parties at the time the agreement was made, and to all of the circumstances surrounding and attendant upon the transaction.

When the agreement was made, in January, 1903, it appeared that Shattuck, Hanninger, and Marks, claiming to be the owners of the Triangle, Standard Quartz, and Iron Prince mining claims, had previously instructed Barnes & Martin to file adverse suits against the application of Costello for patents to the Roy and Leo mining claims, which conflicted with the claims of Shattuck, Hanninger, and Marks.

The "Standard Quartz" case had been tried and won by Barnes & Martin, and Costello was perfecting his appeal to the Supreme Court of the Territory.

The "Triangle" case had been tried, and had resulted in a judgment in the District Court of Cochise County in favor of Costello, although this suit disclosed this important fact, that the discovery monuments of the Roy and Leo mining claims were on the ground of the Standard Quartz mining claim.

The case had been appealed by Barnes & Martin to the Supreme Court of the Territory, and the judgment had been reversed, but thereafter, and before the filing of the remittitur, a motion was made by the appellee therein for a rehearing, upon the ground that the Supreme Court had no jurisdiction to decide the case because the appeal had not been filed within the required time, and upon this ground the Supreme Court dismissed the appeal.

Thus, with victory within his grasp, Barnes found himself confronted with a serious situation in the form of a judgment in favor of Costello, which, though it contained reversible error, stood unreversed.

He was on the verge of departure to New York, and consequently could not give the matter personal attention.

His associate, O'Connell, was engaged in looking after Costello's appeal in the "Standard Quartz" case. Obviously Barnes was in need of assistance which only a capable lawyer could render.

His only course seemed to be to resist the motion for a rehearing, and, in the event it was sustained, to appeal from the order thereon to the Supreme Court of the United States.

This he determined to do, and to carry out his purpose he sought the services of Judge Street and his partner, Mr. Alexander, one of the appellees upon this appeal.

The terms of the agreement made are thus stated by Mr. Alexander, which agreement was found to have been made by the Territorial Supreme Court:

> "* * * Finally Judge Barnes made this expression, 'Now, I want you to attend to this case. I have to go back to New York. Now, if you will attend to this case, if you will agree to attend to this case, I will give you one-third of the fee which I have

> coming to me on a contingent fee from Shattuck, Hanninger, and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third.'"

And again the same witness states:

> "He (Barnes) said that that contingent fee (referring to the fee from the defendants) was one-fourth of whatever was realized from the prosecution of these cases that he had. He didn't say what the case was. I understood it, and I understood it at the time, that it was the whole matter * * * He said that they had this contingent fee coming from Messrs. Shattuck, Hanninger, and Marks, and that we should *get one-third of that* if we cared to take up and perfect the appeal and argue the case before the Supreme Court, the motion for the rehearing, and perfect the appeal in the 'Triangle' case, and we agreed to do it, accepted his offer, and did the work."

Barnes' expression that his fee "was one-fourth of whatever was realized," and his letter to Martin wherein he tells of Shattuck's statement upon his victory in the "Standard Quartz" case, saying, "He says we are to have one-fourth of the ground," clearly show that he or his firm was the equitable owner of one-fourth of the proceeds of the suits, just as his expression, "I will give you *one-third of the fee*" and that "we should get one-third of that," shows clearly the intention of the parties to *charge the subject-matter of the litigation* with the fee of the intervenors.

There certainly was no purpose or intent on Barnes' part to assume a personal liability to the intervenors for their fee, and the intervenors certainly did not seek to exact such an obligation.

The construction placed upon the agreement by the intervenors, always an important feature in determining the intent of the parties, as evidenced by the subsequent conduct of the intervenors, shows conclusively that they looked to the litigation alone for payment and not to the individual credit of Barnes & Martin for compensation.

Thus Mr. Alexander testified:

> "Judge Street and I did not file any claim against the estate of Judge Barnes. I did not consider that the estate of Judge Barnes owed us anything. I considered that I had an interest in this claim."

There was no personal liability upon Judge Barnes. He meant to, and did, confer upon the intervenors one-third of the contingent fee itself.

There was no agreement to pay personally in the future, no agreement to pay a sum equal to one-third, but an offer to give (presently, of course, although to be enjoyed in the future) one-third of the fee itself if the intervenors would agree to do certain things. They accepted the offer and fully performed its terms, and thereupon and thereby there was a completed, finished, and executed agreement which made the intervenors the equitable owners of one-third of the fee. In the words of Judge Earle, in *Harwood vs. La Grange*, 137 N. Y., 583:

> "That the agreement gave the plaintiff (the intervenors) an equitable lien or ownership as equitable assignees in the proceeds of the actions is not open to doubt. It has been so determined in many cases."

This ruling is supported by the following:

Fairbanks vs. Sargent, 104 N. Y., 108; 9 N. E., 870.
Fairbanks vs. Sargent, 117 N. Y., 380; 22 N. E., 1039.
Williams vs. Ingersoll, 89 N. Y., 108.
Boyle vs. Boyle, 106 N. Y., 654; 12 N. E., 709.
Thomas vs. N. Y. & G. L. R. R. Co., 139 N. Y., 179; 36 N. E., 880.
Chester vs. Jumel, 125 N. Y., 237; 26 N. E., 297.
Halmer vs. Evans, 129 N. Y., 140; 29 N. E., 233.
Wright vs. Wright, 70 N. Y., 98.
Ingersoll vs. Coram, 211 U. S., 365.
Wylie vs. Coxe, 56 U. S., 415; 15 How., 415; see 8 Wall., 214.

Louisville, etc., Ry. Co. vs. Wilson, 138 U. S., 501, 506, 507.
Walker vs. Brown, 165 U. S., 654, 664
Fourth St. Bk. vs. Yardley, 165 U. S., 634, 644.
Ketchem vs. St. Louis, 101 U. S., 306.
Cowdry vs. Galveston, 93 U. S., 352, 355.
Central R. R. vs. Pettus, 113 U. S., 116, 127, 128.
Semmes vs. Whitney, 50 Fed., 666.
Mahone vs. Southern Tel. Co., 33 Fed., 702; Appr. 138 U. S., 507.
Frink vs. McComb, 60 Fed., 486.
Smith vs. Young, 62 Ill., 210.
Cooke vs. Thresher, 51 Conn., 105.
Hoffman vs. Vallejo, 45 Cal., 564.
Blakey vs. N. Y. Life Ins., 28 Ind. App., 428.
Bogert vs. Adams, 8 Colo. App., 185.
Patten vs. Wilson, 38 Pa. St., 299.
Wilson vs. Seeber, 66 Atl., 909, 912.
Bank of New Hanover vs. Williams, 79 N. C., 136.
Gulf, C. & S. F. Ry. Co. vs. Eldredge, 80 S. W., 556.

Most of these cases involve the exact point under examination, viz., the effect of an agreement, oral or written, giving or agreeing to give an attorney a contingent interest in the proceeds of litigation. Some of the cases, such as *Fourth Street Bank vs. Yardley,* 165 U.S.,634,and *Ketchem vs. St. Louis,* 101 U. S., 306, are cited because the Supreme Court of the United States deemed the principles therein announced to be controlling in a case so nearly similar to the case at bar as *Ingersoll vs. Coram,* 211 U. S., 365. But all of the cases cited hold, either expressly or by necessary implication, that an agreement like that in the case at bar, made under similar circumstances, constitutes an equitable assignment of a part of the proceeds of litigation and entitles the equitable owner to an equitable lien upon such proceeds to secure the payment of his fee.

A minute examination of the following two cases cited

will suffice to show that the correctness of the position of the intervenors does not admit of doubt and is really not open to dispute. In *Harwood vs. La Grange,* 137 N. Y., 583 (32 N. E., 1000), La Grange, the attorney of record, employed Harwood, another attorney, to render services in connection with certain litigation. The terms of the agreement were that plaintiff was to receive a contingent fee, payable only in event of success, out of the proceeds of the litigation, and in deciding that the agreement made Harwood the equitable owner, and as such entitled him to an equitable lien to the extent of his claim upon the proceeds of the litigation in which he had engaged, the court used the language quoted above.

The New York cases cited have special strength and force in their application to the present controversy, because they all recognize the existence and correctness of the well-settled rule, which the appellant seeks to apply to this case, that ordinarily a mere agreement "to pay out of a particular fund, however clear in its terms, is not an equitable assignment of such fund."

Christmas vs. Russell, 14 Wall., 69, 84.
Trist vs. Child, 21 Wall., 441.
Wright vs. Ellison, 1 Wall., 16.

But the cases very properly hold that the rule has no application to cases like the present controversy, or else, as the Supreme Court of the United States held in *Ingersoll vs. Coram,* 211 U. S., 365, that "These conditions are satisfied in the case at bar."

This latter case, we respectfully submit, is conclusive upon the question under consideration. In that case the successor in interest of Robert J. Ingersoll claimed to be the equitable owner and to be entitled to a lien upon the proceeds of litigation to the extent of $100,000. The contract was simply an agreement that Ingersoll's fee, in the event of success, should be $100,000. It also provided that the defendant was not to be personally liable to Ingersoll except

to pay such fee out of the funds received from the estate of A. J. Davis; and yet the court held that Ingersoll was the equitable owner, and as such entitled to an equitable lien to the extent stated. The court said:

> "The sufficiency of the agreement of August 17, 1891, to create a lien seems not to have been seriously questioned in the circuit court upon the argument of the demurrer. However, the court said that 'Upon all settled rules with reference to the construction of such instruments we cannot doubt that this one of August 17, 1891, created a lien on the funds therein referred to in behalf of Mr. Ingersoll.'"

On the final hearing the effect of the instrument was contested, and the court adhered to its ruling, saying:

> "Whether or not the particular agreement creates a lien is a matter of construction. In this case the fact that there was no primary personal responsibility on J. A. Coram specially serves to stamp the agreement in issue as declaring a purpose to create a lien. Therefore, on the whole, we hold that, on this final hearing on bill, answer, and proofs, the bill must be sustained."

The conclusion of the court is sustained by other authorities.

In *Wylie vs. Coxe*, 15 How., 415, a contract was made with an attorney for the prosecution of a claim against Mexico to pay him a contingent fee of 5 per cent out of the fund awarded. It was held that the agreement constituted a lien upon the fund. In *In re Paschal*, 10 Wall., 483, in the letter retaining Paschal it was said that his compensation would depend upon the action of a future legislature, "unless a recovery is had in the suit, in which event I shall feel authorized to let you retain it out of the amount received." It was held that in accordance with the prevailing rule in this county Paschal had a lien on the fund in his hands for disbursement and professional fees. The case was cited in *McPherson vs. Cox*, 96 U. S., 404, 417, and the doctrine re-

peated. See also *Central Railroad vs. Pettus*, 113 U. S., 116; *Louisville, etc., Railroad Company vs. Wilson*, 138 U. S., 501, 507.

In *Walker vs. Brown*, 165 U. S., 654, it was held that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other obligations, creates an equitable lien on the property so indicated. This was an application of the doctrine of *Fourth Street Bank vs. Yardley*, 165 U. S., 634, and *Ketchum vs. St. Louis*, 101 U. S., 306. These cases are not opposed by *Trist vs. Child*, 21 Wall., 441, and *Wright vs. Ellison*, 1 Wall., 16. In the latter case it is said that it is indispensable to the lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the debtor should be paid out of it. These conditions are satisfied in the case at bar.

In our opinion the distinction between this case and those cited by the appellant not only clearly appears from an examination of those cases, but is authoritatively announced in *Ingersoll vs. Coram*, 211 U. S., 365, 367, 368. The value of *Trist vs. Child*, 21 Wall., 441, which appellant regards as decisive of the case at bar, as an authority in the appellant's favor, is not enhanced by the fact that in that case the court held the contract with the attorney was illegal and void, because contrary to public policy. Moreover, the court held that there could be no assignment of a claim against the Government unless the Federal Statute cited was complied with. It was not pretended that the terms of the statute had been met. But the value of each of the authorities cited by appellant in its application to the case at bar is utterly destroyed by the decision in *Ingersoll vs. Coram*, *supra*.

We must therefore conclude that the intervenors were in fact equitable assignees of a one-third interest in the subject-matter of the litigation, and as such were entitled to,

and had an equitable lien upon, the proceeds of that litigation to the extent thereof.

It remains to be shown that the intervenors sufficiently alleged and proved such interest.

The complaint in intervention (fols. 20 to 39) set out all the necessary but formal allegations, and then clearly alleged the employment of the intervenors upon the terms already discussed, alleged full performance by the intervenors, and after asserting that they had an interest in the matter in litigation, which the facts alleged showed them to have, the intervenors, among other things, prayed "that they be decreed one-third of all moneys, property, stocks, or whatever was paid, or by right ought to be paid, to the said Barnes & Martin and the said J. M. O'Connell."

What else should have been alleged to entitle intervenors to the judgment which they recovered? Nor was the proof of the agreement and all the essential facts to support a recovery wanting. After proving the matters already discussed the intervenors proved that the plaintiff as assignee of the firm of Barnes & Martin had actually received as her share of the fee realized from said litigation, viz., $18,750, all thereof except the one-third retained by O'Connell. The complaint herein alleged that the whole of said fee was assigned to the plaintiff by John H. Martin individually and as surviving partner of the firm of Barnes & Martin, and that no part thereof was paid or delivered to William H. Barnes and John H. Martin as copartners or to either of them (fols. 12, 13, 14). True, there is evidence that a payment of $1,875 was made to John H. Martin, but it does not appear that such payment was not made by plaintiff's order or for her use and benefit.

However, as assignee of the interest or claim for attorney fees in the proceeds realized from said litigation the plaintiff took no other or greater rights or interest than the assignors themselves possessed, and therefore took subject to and charged with the interest and equity of the intervenors

therein, which the evidence and judgment establishes to have been the sum of $6,250.

The cases of *Gulf C. & S. F. Ry. Co.*, 80 S. W., 556, and *Louisville, etc., Ry. Co. vs. Wilson*, 138 U. S., 501, 506, 507, sufficiently establish the power and jurisdiction of the court to determine the rights of the intervenors and to award a judgment against the plaintiff for the amount found to be due. That judgment was correctly awarded to the intervenors against the plaintiff for the amount of $6,250 does not admit of doubt. It appears that plaintiff received the balance of the fee, viz., $10,625, on April 23, 1909, from O'Connell, and that prior to the commencement of the action John H. Martin duly assigned to her all the interest of the firm of Barnes & Martin in the fee in question. Thus the whole of the fee except the one-third which O'Connell deducted for himself was vested in and received by the plaintiff.

So soon as the intervenors heard that the litigation of Shattuck, Hanninger, and Marks had been settled, and long before O'Connell parted with the funds, they served notice of their claim upon O'Connell, demanded payment of $6,250 to themselves, and notified him that if he paid to any one else the intervenors would hold him responsible. And it appears that both Mrs. Barnes and Col. Martin were advised of the intervenors' claim as early as 1905; Martin heard of the claim in March or April, 1905. The original complaint in intervention was filed in December, 1907, and the answer of the plaintiff thereto was filed in July, 1908, more than nine months prior to the payment to her of the $10,625 stated. So that whatever the plaintiff received as the legatee of her husband or as assignee of the firm of Barnes & Martin necessarily came to her charged with the lien of the intervenors and impressed with the trust for their benefit, of which she had full notice and actual knowledge.

Thus it clearly appears that there is nothing whatever in the contention of the appellant to the effect that the judgment is excessive.

This court cannot review the question of the alleged excessive character of the judgment without an examination of the record to ascertain whether the facts found by the Supreme Court of the Territory are justified by the evidence. This court has repeatedly announced that it will not embark upon such an inquiry, but will confine itself to the limitations already specified.

Young vs. Amy, 171 U. S., 179, 185.
Bear Lake, etc., Irrigation Co. vs. Garland, 164 U. S., 1.

Many of the cases already cited announce the well-settled rule that attorneys, being equitable assignees of a fund or the proceeds of litigation charged with their lien, may pursue the subject of the lien wherever it may be found. The right to pursue the fund is elementary when it is found to be in the hands of a person who, like the plaintiff here, took the subject thereof with full notice and knowledge of the existence of the lien.

Hoffman et al. vs. Vallejo, 45 Cal., 564.
Templeton vs. Gresham, 60 Tex., 53.
Petticolas vs. Carpenter, 53 Tex., 23.

In the latter case the court said:

> "The subject-matter of the suit was sold pending the suit and the proceeds paid to the plaintiff in the cause, and yet it was held that the intervenors might follow the proceeds into his hands and have judgment against him for the amount of their respective claims. * * * This was because the court had jurisdiction of the subject-matter of the suit and power to adjust the rights of all who asserted an interest in it or its proceeds."

It follows from what has been said that the appellees were and are entitled to the judgment rendered by the court below, and that such judgment is supported by the findings of fact made by the Territorial Supreme Court.

Point II.

No Error in the Admission or Rejection of Evidence Was Committed by the Trial Court.

The fourth assignment of error submitted by the appellants endeavors to present the question of the competency of the witness Alexander to testify to conversations with the deceased husband of the appellant Belle J. Barnes, but this necessarily involves a construction of paragraph 2536 of the Revised Statutes of Arizona of 1901, which is as follows:

> "In an action by or against executors, administrators or guardians, in which judgment may be rendered, for or against them as such, neither party shall be allowed to testify against the others as to any transaction with or statement by the testator, intestate or ward unless called to testify thereto by the opposite party or required to testify thereto by the court; and the provisions of this section shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent."

This statute was construed by the Supreme Court of Arizona in *Goldman vs. Sawtello*, 7 Ariz., 23; 76 Pac., 696, in which case the court held that in overruling an objection to the competency of a witness the court "required" the witness to testify.

The witness Alexander was required to testify in this case (R., 62-63), and consequently, under the construction placed upon the statute in the case cited, there would be no question to review here upon such a ruling, assuming the question was otherwise reviewable.

But the record shows (R., 63) not even a ruling upon the objection made, and no exception to the admission of the evidence was in fact ever taken, notwithstanding the appearance of an exception in the statement of facts.

To review in this court questions relating to the admission or exclusion of evidence, an exception taken at the time the ruling was made is essential.

Nor is this inflexible rule in any way affected by section 15 of chapter 74 of the Laws of the Territory of Arizona of 1907, which provides that "the giving, refusing or modifying of instructions, and every part of the charge given to the jury, and all rulings, orders and actions of the court in a case, shall be deemed excepted to without formal exception and subject to revision by the Supreme Court for error without bill of exceptions."

Nor is the rule in any way relaxed even if it be true, as counsel for the appellant states on page 6 of appellant's answer to the motion to dismiss the appeal or affirm the judgment appealed from, where counsel say:

> "For years it has been the practice in Arizona under such statute not to except to rulings on questions of evidence."

It is obvious that this court's jurisdiction as regulated by the act of Congress already cited, cannot be, and is not, enlarged or in any way affected either by a mere territorial statute or by habitual laxity in the conduct of trial counsel in Arizona.

Apache County vs. Barth, 177 U. S., 538, 542.
Grayson vs. Lynch, 163 U. S., 468, 473.
Eagle Mining Co. vs. Hamilton, 218 U. S., 513, 515.
Young vs. Amy, 171 U. S., 179, 183.
Gonzales vs. Buist, 224 U. S., 126, 130.

Appellants further complain that the trial court erred in allowing proof of payments made to the appellant Belle J. Barnes after the filing of the appellees' complaint in intervention, and it is said that there were no pleadings to support the offer of such proof.

But the answer of the defendants to the complaint in intervention contains all the facts the proof of which the appellant objected to.

The intervenors, of course, had the right to avail themselves of an admission in the pleadings and to establish by proof an admission by defendants which adversely affected the plaintiff.

It is further claimed by appellants that the court erred in rejecting proof of what Costello and his attorneys said with reference to the weight to be given to the pending appeal to the Supreme Court of the United States in the "Triangle" case. This proposition cannot be maintained. In the first place, there is evidence in the case far more eloquent than anything Costello or his attorneys could have said, which shows conclusively that the services rendered by the appellees were in reality of the greatest value, and that the "Triangle" suit and its dismissal were of such importance and consequence in the settlement of the whole litigation that its discontinuance and withdrawal was made a condition precedent to the settlement of the entire controversy.

But it is immaterial whether the services rendered by the intervenors were of great or little value or of great or little importance. Where the fee to be paid is fixed by agreement, it can make no difference whether the performance involves much or little labor so long as the contract is performed.

Browder et al. vs. Long's Ex'r et al., 66 S. W., 600.

The quantity of the services rendered or what they accomplished has no bearing upon an agreement which fixes the price for a specified service.

But under no circumstances could the self-serving statements made by Costello or his attorneys in January, 1904, as to the importance or unimportance of the "Triangle" case in any way bind the intervenors and be competent even as bearing upon the probability of making the intervenors' contract in January, 1908.

The record shows that the testimony was not offered as bearing upon the question of probability.

It was offered solely in an attempt to show that in making

the settlement Costello paid no attention to the "Triangle" case.

As this court said in *Curtin vs. Benson*, 222 U. S., 85, "we cannot now extend the evidence beyond the special and limited purpose of its introduction."

But the alleged fact sought to be established was obviously immaterial, and the proof by which appellants sought to establish it utterly incompetent and inadmissible for such or any other relevant purpose. Nor is there any merit in appellants' claim that the trial court erred in excluding a telegram from Martin to Barnes which congratulated Barnes upon his success in the trial of the "Standard Quartz" case.

This, like the alleged statements of Costello and his attorneys as to the alleged unimportance of the "Triangle" case, is said to bear upon the probability of Barnes making the contract of employment with the intervenors. Since the Territorial Supreme Court found as a fact that the contract had been made, an inquiry at this time before this court as to the probability of its having been made is wholly irrelevant. No foundation whatever was laid for the introduction of this secondary evidence, but apart from that the evidence offered amounted to nothing. It was at best a mere expression of opinion by Martin, addressed to his partner, by which they sought to affect the rights of the appellees. Obviously, no judgment will be reversed because of the exclusion of a piece of evidence incompetent in itself and which could not possibly have affected the decision had it been admitted.

It is apparent that appellants were not prejudiced by any of the rulings made by the court, and that the undisputed evidence in support of the judgment, apart from the evidence involved in these rulings, was sufficient and ample to sustain it.

Point III.

For the reasons stated, the judgment of the lower court should be affirmed.

Respectfully submitted,

J. L. B. ALEXANDER,
WILLIAM M. SEABURY,
Attorneys for Appellees.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
Of Counsel.

[21108]

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 445.

BELLE J. BARNES, L. H. MANNING, AND EPES RANDOLPH, APPELLANTS,

vs.

J. L. B. ALEXANDER AND MARY E. STREET, EXECUTRIX OF WEBSTER STREET, DECEASED, APPELLEES.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

Motion.

Come now the appellees herein and move this honorable court to dismiss the appeal now pending herein, upon the ground that said appeal presents for review no question which this court has jurisdiction to consider, or in the alternative to affirm the judgment from which the appeal is taken, and if both motions be denied, to transfer the cause

to the summary docket of this court to the end that its determination may be expedited.

Respectfully submitted,

J. L. B. ALEXANDER,
WILLIAM M. SEABURY,
Attorneys for Appellees.

ALDIS B. BROWNE,
WILLIAM M. SEABURY,
J. L. B. ALEXANDER,
ALEXANDER BRITTON,
EVANS BROWNE,
Of Counsel for Appellees.

SIR: Please take notice that the foregoing motion will be submitted to the court, at the city of Washington, District of Columbia, on Monday, March 24, 1913, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Yours truly,

J. L. B. ALEXANDER,
WILLIAM M. SEABURY,
Attorneys for Appellees.

Dated at Phœnix, Arizona, February 17, 1913.

To Eugene S. Ives, Esq., Tucson, Arizona, attorney for appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 445.

BELLE J. BARNES, L. H. MANNING, and EPES RANDOLPH, *Appellants,*

vs.

J. L. B. ALEXANDER and MARY E. STREET, *Executrix of Webster Street, Deceased, Appellees.*

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

Statement.

This is a motion under Rule 6 to dismiss or affirm. The appeal pending is from a judgment of the Supreme Court of the Territory of Arizona, which affirmed a judgment for $6,250 in favor of appellees against appellant Belle J. Barnes, which judgment was rendered in the District Court of such Territory after a trial before the court without a jury.

Point I.

THIS COURT HAS NO JURISDICTION TO REVIEW ANY OF THE QUESTIONS PRESENTED BY THE ASSIGNMENT OF ERRORS.

This court's jurisdiction upon this appeal is fixed and regulated by the act of April 7, 1874, chapter 80, 18 Stat., 27. It has been held repeatedly that this court's jurisdiction, under this act is limited to an inspection of the findings of fact to see if the findings support the judgment rendered,

and to a review of exceptions which were duly taken to rulings of the trial court upon the admission or exclusion of evidence.

Young *vs.* Amy, 171 U. S., 179, 183.
Harrison *vs.* Perea, 168 U. S., 311, 323.
Mammoth Mining Co. *vs.* Salt Lake Machine Co., 151 U. S., 447, 450.
San Pedro, etc., Co. *vs.* United States, 146 U. S., 120, 131.
Apache County *vs.* Barth, 177 U. S., 538, 542.
Bear Lake Irrigation Co. *vs.* Garland, 164 U. S., 1, 18.
Grayson *vs.* Lynch, 163 U. S., 468, 473.
Haws *vs.* Victoria, etc., Co., 160 U. S., 303, 312, 313.
Stringfellow *vs.* Cain, 99 U. S., 610.
Neslin *vs.* Wells, 104 U. S., 428, 429.
Idaho, etc., Co. *vs.* Bradbury, 132 U. S., 509, 514, 515.
Eagle Mining Co. *vs.* Hamilton, 218 U. S., 513, 515.

An examination of the transcript of record and an inspection of the assignment of errors show that no question which this court has jurisdiction to consider is raised or presented for review.

Ten errors are assigned.

The first assignment and paragraph "a" of the sixth assignment question the sufficiency of the complaint in intervention, not to state a cause of action, but to entitle the intervenors to intervene in the litigation.

This question involves only the construction or interpretation of a local territorial statute upon a mere question of practice.

The subject of intervention in Arizona is regulated by paragraph 1278 of the Revised Statutes of Arizona, 1901, which is as follows:

> "Any person who has an interest in the subject matter of the suit which can be affected by the judg-

ment, may, on leave of the court or judge, intervene in such suit or proceeding at any time before trial."

This statute is identical with the former statute upon the subject, namely, paragraph 656 of the Revised Statutes of Arizona, 1887.

This latter statute has been construed by the Supreme Court of Arizona. That court has held that the granting of the right to intervene is purely discretionary with the trial court.

London-Paris, etc., Bank *vs.* Abrams, 6 Ariz., 87, 90 (53 Pac., 588).

The rule repeatedly announced by this court is that the construction placed upon a local statute by a territorial Supreme Court will be adopted by this court and will not be disturbed in the absence of manifest error in such construction.

Sweeney *vs.* Lomme, 22 Wall., 208, 213.
Copper Queen Mining Co. *vs.* Arizona, 206 U. S., 474.
Kealoha *vs.* Castle, 210 U. S., 149, 153, 154.
Treat *vs.* Grand Canyon Ry. Co., 222 U. S., 448, 452.
English *vs.* Arizona, 214 U. S., 359, 361, 363.
Fox *vs.* Haarstick, 156 U. S., 674.
Clason *vs.* Matko, 223 U. S., 646, 653.
Armijo *vs.* Matko, 181 U. S., 558, 561.
Santa Fe County *vs.* Coler, 215 U. S., 296, 305.
Albright *vs.* Sandoval, 216 U. S., 331, 339.
Sandoval *vs.* Randolph, 222 U. S., 161, 164.

There is no manifest error in the rulings of the court construing the statute quoted, from which it follows that these assignments present nothing for review.

The fourth assignment endeavors to present the question of the competency of the witness Alexander to testify to conversations with the deceased husband of the appellant Belle

J. Barnes, but this necessarily involves a construction of paragraph 2586 of the Revised Statutes of Arizona, 1901, which is as follows:

> "In an action by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such, no party shall be allowed to testify against the others as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party or *required to testify thereto by the court;* and the provisions of this section shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent."

This statute was construed by the Supreme Court of Arizona in Goldman *vs.* Sotelo, 7 Ariz., 23 (60 Pac., 696), where the court held that in overruling an objection to the competency of a witness the court "required" the witness to testify.

The witness Alexander was "required" to testify in this case (R., 62, 63), and, consequently, under the construction placed upon the statute in the case cited, there would be no question to review here upon such a ruling, assuming the question was otherwise reviewable.

But the record shows (R., 63) not even a ruling upon the objection made and no exception to the admission of the evidence was, in fact, ever taken, notwithstanding the appearance of an exception in the statement of facts.

To review in this court questions relating to the admission or exclusion of evidence, an exception is essential, notwithstanding the territorial statute to the effect that the rulings are deemed to be excepted to whether an exception be in fact taken or not, for, obviously, this court's jurisdiction as regulated by the act of Congress already cited, cannot be

and is not, enlarged or in any way affected by a mere territorial statute.

Apache County *vs.* Barth, 177 U. S., 538, 542.
Grayson *vs.* Lynch, 163 U. S., 468, 473.
Eagle Mining Company *vs.* Hamilton, 218 U. S., 513, 515.
Young *vs.* Amy, 171 U. S., 179, 183.
Gonzales *vs.* Buist, 224 U. S., 126, 130.

The second, third and fifth assignments seek to review questions relating to the admission and rejection of evidence, but the record (pages 47-48, 55, 79, 80) to which these assignments respectively relate, shows that no exception was in fact taken to any of the rulings now complained of.

The second assignment complains that evidence of the receipt of money by appellant after the commencement of the action was erroneously admitted, while assignments three and five relate to the exclusion of certain evidence offered by appellant.

But it is apparent that appellant was not prejudiced by any of these rulings, and that the undisputed evidence in support of the judgment, apart from the evidence involved in these assignments, was sufficient and ample to sustain it.

Inasmuch as this court will not consider questions which relate either to the weight or the credibility of the evidence (Title Guaranty & Surety Company *vs.* Nichols, 224 U. S., 346, 353), or which relate to the effect of certain evidence (Eagle Mining Company *vs.* Hamilton, 218 U. S., 513, 515), it is clear that these assignments present nothing for review.

But if the questions sought to be raised by assignments two, three, and five were reviewable here under proper exceptions, such a review would be profitless to the appellant, because the questions so sought to be presented are frivolous.

The eighth and ninth assignments and paragraph "*b*" of the sixth assignment all seek a review of the amount of the judgment recovered by the intervenors.

Such an inquiry would require this court to examine the record to ascertain whether the facts found are justified by the evidence. This the court will not do.

As this court said in Young *vs.* Amy, 171 U. S., 179, 185:

> "The jurisdiction of this court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment."
>
> Bear Lake Irrigation Co. *vs.* Garland, 164 U. S., 1, 18, citing:
> Stringfellow *vs.* Cain, 99 U. S., 610.
> Neslin *vs.* Wells, 104 U. S., 428.
> Eilers *vs.* Boatman, 111 U. S., 350.
> Idaho & Oregon Land Co. *vs.* Bradbury, 132 U. S., 509.
> Mammoth Mining Co. *vs.* Salt Lake Machine Co., 151 U. S., 447, 450.

In the case at bar there is no assignment that the findings of fact made by the Territorial Supreme Court are defective in any specified respect or that they do not support the judgment.

The complaint under these latter assignments is that the judgment was excessive, although, as appears from the statement of facts, such judgment is clearly supported by the findings.

In the tenth assignment the claim of error is based upon the general ground that "by the law of the land" judgment ought to have been given for the appellant and against the appellees. This, of course, is too general an assignment of error to present any question for review.

Finally, we respectfully contend that the seventh assignment of error presents no question for review, because it is too general for such purpose.

It is equivalent to an assignment that a court erred in awarding judgment for the appellees, because the appellees were not entitled to such judgment without any statement showing the respect in which the judgment was erroneous.

We respectfully submit that not a single error is assigned which this court, under the limitations already discussed, has jurisdiction to consider, and that for this reason the appeal should be dismissed.

Point II.

IF THE MOTION TO DISMISS BE DENIED, THE MOTION TO AFFIRM SHOULD BE GRANTED BECAUSE THERE IS BOTH COLOR AND SUBSTANTIAL GROUND FOR THE MOTION TO DISMISS.

We believe it to be clear, from the foregoing authorities, that the motion to dismiss should be granted, but if we are in error in this respect, we respectfully contend that there is both color and substantial ground for the making of the motion, and that if it be denied, then in accordance with the usual practice of this court, the motion to affirm should be granted.

The Alaska, 130 U. S., 201, 208.
Whitney *vs.* Cook, 99 U. S., 607.
Hinckley *vs.* Morton, 103 U. S., 764.
Davies *vs.* Corbin, 113 U. S., 687.
Northern Pacific Railroad *vs.* Amato, 144 U. S., 465, 473.
Bienville Water Supply Co. *vs.* Mobile, 175 U. S., 109, 114.

The findings show that the merits, assuming they were reviewable here, involve the question upon which the ruling of this court in Ingersoll *vs.* Coram, 211 U. S., 365, is conclusive.

The appellee, Alexander, and the deceased husband of the appellee Mary E. Street, who were attorneys and partners, entered into a contingent fee agreement with the deceased husband of the appellant Belle J. Barnes, who was also an attorney, whereby Barnes agreed that Alexander and Street should have a specified proportion of his contingent fee in the proceeds of certain litigation then pending. Alexander

and Street admittedly did the work required of them, never looked to the personal credit of Barnes, but looked exclusively to the subject matter of the litigation for compensation. The appellant Belle J. Barnes, as legatee of her husband's estate and as assignee of his law partnership, admittedly received her husband's contingent fee from the proceeds of the litigation and refused to pay over to the appellees their share of it.

Upon the authority of Ingersoll *vs.* Coram, 211 U. S., 365, the court correctly held that appellees were entitled as equitable assignees to their proportionate share of the contingent fee so paid to the appellant Belle J. Barnes and her deceased husband, and rendered judgment accordingly.

This ruling is supported not only by the case cited, but by the following:

Wylie *vs.* Coxe, 56 U. S., 415; 15 How., 415; see 8 Wall., 214.
Louisville, etc., Ry. Co. *vs.* Wilson, 138 U. S., 501, 506, 507.
Walker *vs.* Brown., 165 U. S., 654, 664.
Fourth St. Bank *vs.* Yardly, 165 U. S., 634, 644.
Ketcham *vs.* St. Louis, 101 U. S., 306.
Cowdry *vs.* Galveston, 93 U. S., 352, 355.
Central R. R. *vs.* Pettus, 113 U. S., 116, 127, 128.
Sammes *vs.* Whitney, 50 Fed., 666.
Mahone *vs.* Southern Tel. Co., 33 Fed., 702; Approved in Louisville, etc. R. R. Co. *vs.* Wilson, 138 U. S. 501, 507.
Frink *vs.* McComb, 60 Fed., 486.
Smith *vs.* Young, 62 Ill., 210.
Cooke *vs.* Thresher, 51 Conn., 105.
Hoffman *vs.* Vallejo, 45 Cal., 564.
Blakey *vs.* N. Y. Life Ins., 28 Ind. App., 428.
Bogert *vs.* Adams, 8 Colo. App., 185.
Patton *vs.* Wilson, 38 Pa. St., 299.
Wilson *vs.* Seeber, 66 Atl., 909, 912.
Bank of New Hanover *vs.* Williams, 79 N. C., 136.
Gulf C. & S. F. Ry. Co. *vs.* Eldredge, 80 S. W., 556.

We therefore respectfully submit that even if the motion to dismiss be denied the motion to affirm should be granted for the reasons stated.

Point III.

IF BOTH MOTIONS BE DENIED, SINCE IT IS APPARENT THAT THE CASE IS OF SUCH A CHARACTER AS NOT TO JUSTIFY EXTENDED ARGUMENT, WE RESPECTFULLY MOVE THE TRANSFER OF THE CAUSE TO THE SUMMARY DOCKET OF THIS COURT TO THE END THAT ITS DETERMINATION MAY BE EXPEDITED.

Respectfully submitted,

J. L. B. ALEXANDER,
WILLIAM M. SEABURY,
Attorneys for Appellees, Phœnix, Arizona.

ALDIS B. BROWNE,
WILLIAM M. SEABURY,
J. L. B. ALEXANDER,
ALEXANDER BRITTON,
EVANS BROWNE,
Of Counsel.

SUPREME COURT

OF THE

UNITED STATES

October Term, 1912.

No. 445.

Belle J. Barnes, L. H. Manning and Epes Randolph,
Appellants.

vs.

J. L. B. Alexander and Mary E. Street, Executrix of of Webster Street, Deceased,
Appellees.

Appellants' Answer to the Motion to Dismiss the Appeal or Affirm the Judgment.

The appellees have moved under Rule VI to dismiss or affirm.

Appellants' brief is on file and the attention of the Court is invited to it upon consideration of the motion.

The motion is based upon the following proposition:

"This court has no jurisdiction to review any of the questions presented by the assignment of errors."

In support of such proposition counsel for appellees say:

> "An examination of the transcript of record and an inspection of the assignment of errors show that no question which this court has jurisdiction to consider,

is raised or presented for review. Ten errors are assigned. The first assignment and paragraph "a" of the sixth assignment question the sufficiency of the complaint in intervention, not to state a cause of action, but to entitle the interventors to intervene in the litigation."

With this statement we take issue.

The appellees claim that under a contract made by their predecessors in interest the firm of Street & Alexander with the firm of Barnes & Martin, the firm of Street & Alexander became not the creditors of the firm of Barnes & Martin but the owners of a one-third interest in a certain contingent fee which Barnes & Martin had in litigation, which, at the time of such contract Barnes & Martin were conducting.

The issue is as to whether Street & Alexander, by such contract, became creditors of Barnes & Martin, or whether they became owners of one-third of such fee.

The first assignment of error is as follows:

"The Supreme Court of the Territory of Arizona erred in not sustaining the first assignment of error made by the appellant Belle J. Barnes upon appeal to the said Supreme Court, which said first assignment of error is as follows:

" 'The Court erred in overruling the demurrer of the plaintiff to amended complaint in intervention, upon the ground that the facts stated therein do not constitute a ground for intervention or show any right to intervene, for the reason that it appears upon the face of said complaint in intervention that the intervenors were not the owners of and did not have any lien upon any part of the claim or demand sued upon by the plaintiff, and that said amended complaint in intervention does not show facts which would amount to an assignment either legal or equitable, of any portion of said claim or demand, but merely shows that the intervenors were creditors of the late firm of Barnes & Martin.' "

Subdivision "a" of the second assignment of error is as follows:

> "a. Because the amended complaint in intervention did not state facts sufficient to entitle the intervenors to intervene, for the reason stated in the first assignment of error."

The seventh assignment of error is as follows:

> "The said Supreme Court of the Territory of Arizona erred in holding and ruling that the facts stated in the amended complaint in intervention were sufficient to entitle the intervenors to relief against the plaintiff, and in overruling the assignment of error with respect thereto, and in not reversing the said judgment so appealed from because the said amended complaint in intervention did not state facts entitling the intervenors to any relief or judgment against the plaintiff."

We agree with counsel for appellees that this court will not review the construction or interpretation of a local territorial statute upon a mere question of practice.

It is manifest, however, from the three above mentioned assignments of error that appellants were questioning the decision of the Supreme Court of the Territory of Arizona in holding that the amended complaint in intervention stated facts sufficient to constitute an equitable assignment to the firm of Street & Alexander of any portion of the fee of Barnes & Martin or, in other words stated facts sufficient to constitute a cause of action.

If it did not state facts sufficient to constitute a cause of action, then it did not state facts sufficient to constitute a ground for intervention.

The reason assigned by appellants why the amended complaint in intervention did not state facts sufficient to constitute a ground for intervention was not founded upon the statute governing the right to intervene, but was expressly founded upon its failure to sustain facts sufficient

to constitute an assignment either legal or equitable, of any portion of the fee of Barnes & Martin.

Moreover, in their main brief appellants have made specifications of error. These specifications are permissible under rule 21. It is immaterial, if the specifications are complete, whether the assignments in the record are sufficient or not.

That the specifications in the brief are proper, see:

U. S. vs. Pena., 176 U. S., 242.
Stevenson vs. Barbour, 135 U. S. 609.
School Dist. vs. Hall, 106 U. S. 428.
Rowe vs. Phelps 152 U. S. 87.

Without reference, however, to the sufficiency of the specifications of error set forth in the brief, we fail to see how there can be any doubt as to the sufficiency of the above quoted assignment VII.

It is conceded that the claim of ownership of a part of the fee by the firm of Street & Alexander can be sustained only upon the theory advanced by appellees and accepted by the court, that the contract found amounted to an equitable assignment.

This question is squarely presented by the assignment of error number VII, and no question involving the construction of the statute governing intervention is even suggested in such assignment of error.

Assignment II attacks the ruling of the trial court and its affirmance by the Supreme Court of the Territory, permitting evidence of payment subsequent to the commencement of the suit. Assuming that the first ground urged under this assignment goes only to the construction of the statute permitting intervention, the other grounds urged thereunder, and particularly that the pleadings did not justify the admission of the evidence, save the assignment.

That such a question of pleading can be considered by this court, see:

Graham vs. Lynch, 163 U. S. 468;
Title Guaranty Co. vs. Nichols 224 U. S. 346.

It is urged against this assignment that there does not appear in the record that an exception was taken to the ruling of the court in admitting the evidence, and it is urged that such omission is fatal to the assignment even although the statement of facts expressly declares that an exception was taken.

Section 15, of Chapter 74, Laws of 1907, provides:

1. "The giving, refusing or modifying of instructions, and every part of the charge given to the jury, and all rulings, orders, and actions of the court in a case shall be *deemed excepted to* without formal exception and subject to revision by the Supreme Court, for error, without bill of exceptions."

It is urged that counsel may not rely on this statute, but are compelled formally to except to rulings on evidence, else they cannot be considered by this court. Of the several cases cited to support this contention, in but one, Anache County vs. Barth, 177 U. S. 538 was the question considered. In that case it appeared that the statute there construed, being in the main similar to the one above quoted, had been passed "subsequently to the trial of the action." In the other cases cited there is general language that a formal exception to rulings of the trial court must appear in the record else they will not be considered.

But in none of these cases was there a statute obviating the necessity of formal exception, and the language used in each of them must be considered in the light of the facts of the particular case. It is true that the Act of April 7, 1874, concerning "practice in territorial courts and appeals therefrom" requires that "rulings of the court on the admission

or rejection of evidence, when excepted to" shall be certified to this court; but this statute does not in any manner suggest that formal exceptions are necessary in territories where there is a statute similar to the one above quoted. This is particularly true where, as in this case, the statement of facts expressly declare that the rulings were excepted to. (Transcript, page 105, folio 205.)

For years it has been the practice in Arizona under such statute not to except to rulings on questions of evidence, and in none of the number of appeals from Arizona that have been considered by this court where that question might have been decided is there any intimation that formal exceptions are necessary.

The same objection is urged against assignments III and V and to this objection the same answer is made.

It is also urged, with strange inconsistency, that "It is apparent that appellant was not prejudiced by any of these rules, and that the undisputed evidence in support of the judgment, apart from the evidence involved in these assignments, was sufficient and ample to sustain it. Inasmuch as the court will not consider questions which relate either to the weight or credibility of the evidence (Title Guarantee Co. vs. Nichols, 224 U. S. 346-353) or which relate to the effect of certain evidence (Eagle Milling Co. vs. Hamilton, 218 U. S. 513-515) it is clear that these assignments present nothing for review." The three assignments so attacked (being assignments II, III., V) present rulings on questions of evidence. It is claimed by appellant that the court erred in receiving evidence of payments made after the commencement of the suit, (Assignment II) and that it erred in excluding evidence offered by appellant bearing on the vital question of the probability of the contract between Barnes and Street and Alexander having been made (Assignments III and V). If the admission of the evi-

dence of the payment was improper under the recognized rules of evidence for the reasons assigned, this court will reverse the lower court and order a new trial. The same must be said of Assignments III and V. If the evidence sought to be introduced was relevant and competent, the action of the trial court in excluding it was error.

Of course, if this court should take a view of the case making such evidence immaterial, it would not be error. Such, however, is not the case.

Since the court cannot examine the evidence to ascertain whether it supports the findings, when it finds that error has been committed in receiving or rejecting evidence, it must reverse, for it cannot say that even if the evidence improperly admitted be excluded or the evidence improperly excluded be admitted, the findings must remain the same, as this would be passing upon the sufficiency of the evidence to support such findings.

The two cases cited by counsel, to support their contention that these assignments (II, III and V) may not be considered, do not support that contention. In Eagle Mining Co. vs. Hamilton the court held itself unable to consider the assignment on rulings of evidence because of the omission of an exception to the ruling, there not appearing to be any statute of New Mexico similar to the Arizona statute. And in Globe G. & S. Co., vs. Nichols the contentions were, not that the court ruled improperly on the question of evidence, but that the evidence was insufficient as a matter of law, to go to the jury and that the question of diligence was wrongly decided by the jury. As to the assignments of error relating to the admission of evidence the court says, that the lower court held them to be insufficiently saved and not so material as to require a reversal in which this court concurred.

The rule has been repeatedly announced that on appeal to this court where it has not the power to investigate the evidence for the purpose of determining its sufficiency to support the judgment or findings attacked, the erroneous admission or rejection of evidence will be held sufficient to cause a reversal unless it appears beyond doubt that such error could not prejudice the rights of the party against whom the evidence was received or whose evidence was rejected.

Mexia vs. Oliver, 148 U. S. 664.
Smith vs. Shoemaker, 17 Wall, 630.

Nothing appears in either case to support the contention of counsel for appellees that this court may consider the effect of its decision in allowing or rejecting evidence on the findings, or may say that the error, if any, was immaterial because the findings must remain the same.

We do not consider it necessary to show on this motion how the evidence admitted or how the exclusion of evidence offered prejudiced appellant. It is enough here to show that prejudice can be predicated upon the rulings complained of. And this is apparent from what has been said.

Assignments VIII, IX and paragraph C of assignment VI attack the judgment on the ground that it is excessive. It is said by counsel for appellees "Such an inquiry would require this court to examine the record to ascertain whether the facts found are justified by the evidence. This the court will not do." And this the court is not asked to do. The question is presented by the statement of facts, and is one of law, not of the sufficiency of the evidence to support the findings or any of them. The authorities cited are not in point. (See finding XXI, p. 104, fol. 202 and finding XXII, p. 102, fol. 203).

It is therefore submitted that the assignments of error as they appear in the record are sufficient regardless of the sufficiency of the specifications of error in the brief, to confer jurisdiction on this court of this appeal, and that there is not such color of right to a dismissal as to warrant a consideration of the motion to affirm.

School Dist. of Ackley vs. Hall, 106 U. S. 428.

Nor is the appeal frivolous or taken for the purpose of delay. The appellant complains of substantial error in the rulings on evidence and in the rendition of judgment on the findings and is entitled to a full consideration upon a hearing. The jurisdictional questions raised in the motion to dismiss are manifestly without merit, and it is not complained that the appeal has been taken for the purpose of delay.

Counsel for appellant feel that the questions involved require full and complete exposition upon a regular hearing, and that nothing appears to justify placing this cause upon the summary docket.

For a discussion of the merits, from which counsel for appellant here refrain as being improper, the court is referred to appellant's brief.

It is respectfully submitted that the several motions should be denied.

EUGENE S. IVES,
Attorney for Appellants.

BARNES *v.* ALEXANDER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 109. Submitted December 1, 1913.—Decided January 12, 1914.

Where the remarks in the opinion are not necessary to the decision, which was placed mainly on other grounds, and are contrary to an earlier decision, this court is at least warranted in treating the question as at large.

Although it might be its duty to do so, it would be a strong thing for

this court to decide that there was nothing to warrant a conclusion, whether of law or of fact, sanctioned by the highest court of a Territory that has since become a State, upon a matter no longer subject to review here. *Phœnix Ry.* v. *Landis*, 231 U. S. 578.

An informal business transaction should be construed as adopting whatever form consistent with the facts as is most fitted to reach the result seemingly desired. *Sexton* v. *Kessler*, 225 U. S. 90.

It is an ancient principle even of the common law that words of covenant may be construed as a grant when they concern a present right.

In equity, a contract to convey a specific object even before it is acquired will make a contractor a trustee as soon as he gets title thereto.

An obligation to pay, but definitely limited to payment out of the fund, creates a lien. There should be but one rule in this respect and that is the one suggested by plain good sense.

Where parties have a lien on a fund they can follow it, as soon as identified, into the hands of others than the person originally receiving it. On this point this court follows the territorial court.

In this case *held* that parties promised for a consideration a definite portion of a contingent fee if earned had a lien thereon when received by the promisor that they could follow and enforce.

13 Arizona, 338, affirmed.

THE facts, which involve the validity of a judgment obtained by the defendants in error against the plaintiff in error in the courts of the Territory of Arizona, are stated in the opinion.

Mr. Eugene S. Ives for appellants.

Mr. J. L. B. Alexander, Mr. W. M. Seabury, Mr. Aldis B. Browne, Mr. Alexander Britton and *Mr. Evans Browne* for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

The proceeding out of which this case arises was brought by the appellant Mrs. Barnes, for an account of the prop-

erty received in settlement of certain mining suits and for a recovery of one-fourth of the same. The defendants, Shattuck, Hanninger and Marks, were parties to these suits and employed as their attorneys the firm of Barnes and Martin and one O'Connell under an agreement that the lawyers should have as their compensation one-fourth of all that was received by the said defendants. It may be assumed that Mrs. Barnes represented this claim. While the present suit was pending another firm, whose claim now is represented by the appellees, intervened and claimed one-third of this contingent fee of one-fourth. At the trial it appeared that the original defendants had paid to O'Connell the amount due; $18,750. Pending the suit O'Connell paid over $10,625 of this to Mrs. Barnes, retaining $6250, and paying Martin, the junior member of the firm of Barnes and Martin, $1875. The court entered no decree against the original defendants but did decree that Mrs. Barnes was liable to the appellees for $6250, being one-third of the contingent fee. She appealed to the Supreme Court of the Territory, but it affirmed the judgment below. *Barnes* v. *Shattuck*, 13 Arizona, 338. The other two appellants in this court are the sureties on her supersedeas bond.

The main question is whether the facts set forth in the findings certified justify the conclusion of the courts below. The whole matter rests on conversations, in one of which Barnes said to Street and Alexander 'if you will attend to this case I will give you one third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third.' In others also he explained what his firm was to have and told Street and Alexander that they should get one-third of that if they would do certain work that he had not time to attend to. Street and Alexander did the work required, it does not matter whether it was more or less;—there

was some attempt to raise a question about the fact, but we regard it as beyond dispute. The only serious argument is that, whatever they did, their compensation depended upon a personal promise that gave them no specific claim against the fund. For this proposition reliance is placed upon *Trist* v. *Child*, 21 Wall. 441. In that case Child had an agreement with Trist that Child should take charge of a claim of Trist before Congress and should receive twenty-five per cent. of whatever sum Congress might allow. The suit alleged a lien on the sum allowed and prayed that Trist might be enjoined from withdrawing the money from the Treasury and might be decreed to pay the amount due. The bill was dismissed on the ground that the contract was illegal, but it was added that Child had no lien because it was forbidden by act of Congress, and also, it was said, because there was no sufficient appropriation of the fund, so that the only remedy, if there had been one, would have been at law. (*Wright* v. *Ellison*, 1 Wall. 16; *Christmas* v. *Russell*, 14 Wall. 69.) This decision, so far as it concerns us here, seems to have overlooked *Wylie* v. *Coxe*, 15 How. 415, which decided that a contract for a contingent fee out of a fund awarded constituted a lien upon the fund. The remarks in *Trist* v. *Child* were not necessary to the decision which was placed mainly on other grounds, so that at least we are warranted in treating the question as at large.

It would be a strong thing to decide that there was nothing to warrant the conclusion, whether of law or fact, sanctioned by the highest court of a Territory that since has become a State, upon a matter no longer subject to review by us. See *Phoenix Ry. Co.* v. *Landis*, 231 U. S. 578. But it might be our duty and we pass that consideration by. We start, however, with the principle that an informal business transaction should be construed as adopting whatever form consistent with the facts is most fitted to reach the result seemingly desired. *Sexton* v.

Kessler, 225 U. S. 90, 96, 97. Obviously the only thing intended or desired was to give the appellees a claim to one-third of the fund received by Barnes if and when he should receive it. It is true that there was in a sense a *res* as to which present words of transfer might have been used. There was a right vested in Barnes unless discharged to try to earn a fee contingent upon success. But in a speculation of this sort the parties naturally turned their eyes toward the future and aimed at the fruits when they should be gained. They therefore used words of contract rather than of conveyance; but the important thing is not whether they used the present or the future tense but the scope of the contract. In this case it aimed only at the fund. Barnes gave no general promise of reward; he did not even give a promise qualified and measured by success to pay anything out of his own property, referring to the fund simply as the means that would enable him to do it. See *National City Bank* v. *Hotchkiss*, 231 U. S. 50, 57. He promised only that if, when and as soon as he should receive an identified fund one-third of it should go to the appellees. But he promised that. At the latest, the moment the fund was received the contract attached to it as if made at that moment. It is an ancient principle even of the common law that words of covenant may be construed as a grant when they concern a present right. *Sharington* v. *Strotton*, Plowden, 298, 308. *Hogan* v. *Barry*, 143 Massachusetts, 538. *Ladd* v. *Boston*, 151 Massachusetts, 585, 588. And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing. *Mornington* v. *Keane*, 2 DeG. & J. 292, 313. *Holroyd* v. *Marshall*, 10 H. L. C. 191, 211.

The obligation of Barnes was as definitely limited to payment out of the fund as if the limitation had been stated in words, and therefore creates a lien upon the

principle not only of *Wylie* v. *Coxe*, *supra*, but of *Ingersoll* v. *Coram*, 211 U. S. 335, 365–368, which cites it and later cases. See further to the same point, *Burn* v. *Carvalho*, 4 My. & Cr. 690, 702, 703. *Rodick* v. *Gandell*, 1 DeG., M. & G. 763, 777, 778. *Harwood* v. *La Grange*, 137 N. Y. 538, 540. It is suggested that there is an American doctrine opposed to that which is established in England. We know of no such opposition. There is or ought to be but one rule, that suggested by plain good sense.

After making their contracts the parties seem to have construed them as we have done. Barnes wrote to his partner, when they had succeeded in the cases concerned, in terms showing that he regarded their own claim as specific, 'to have one-fourth of the ground,' the principle on which this suit was brought; and when a settlement was to be made he went to Phoenix and notified Street and Alexander. For the same reason the latter firm filed no claim against the estate of Barnes, thinking that it owed them nothing but that they had one-third of the contingent fee. It is not necessary to consider whether the lien attached to what we have called the *res*, before the fund was received, as a covenant to set apart rents and profits creates a lien upon the land. *Legard* v. *Hodges*, 1 Ves., Jr. 477. It is enough that it attached not later than that moment.—We have considered the case upon the merits. The argument upon them for the appellants is mixed with others as to the sufficiency of the complaint in intervention. Upon the point of pleading we see no occasion to go behind the decision below. *Phoenix Ry. Co.* v. *Landis*, 231 U. S. 578.

Another matter argued is that the appellees should not have been allowed to prove the payment made after the suit was begun. But the appellees properly were allowed to intervene in a suit to recover the fund. Rev. Stat. Arizona, 1901, § 1278. *London, Paris & American Bank* v. *Abrams*, 6 Arizona, 87, 90; *Louisville, Evansville & St.*

Louis R. R. Co. v. *Wilson*, 138 U. S. 501. Even if their lien was only inchoate when the suit was begun, which we do not intimate, they had a right to protect their interest and of course were not deprived of it by the plaintiff's reaching the result that they also desired. Having a lien upon the fund, as soon as it was identified they could follow it into the hands of the appellant Barnes. On this point also we shall go into no question of pleading or procedure but shall accept the decision of the territorial Supreme Court.

The only remaining objection that seems to us to need a word of answer, is that as Mrs. Barnes only received $10,625, she should not have been charged with the whole third, $6,250. As the lien of the appellees attached to the whole two-thirds of the quarter remaining to Barnes and Martin after taking out O'Connell's third, we do not see on what ground she could complain, if the objection is open. It seems probable that it is only an after thought of counsel and that the sum retained by Martin was what would come to him after deducting the share of Street and Alexander's fee that properly fell upon him as between him and his former partner's estate.

Judgment affirmed.